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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~246.~~ 57

MARY RYAN, L. S. LE BOURGEOISE, E. C. LE BOURGEOISE, CHARLOTTE T. CHARLESS, WILLIAM WALKER, MARY WALKER, F. A. RECTOR, THOMAS H. RECTOR, WILLIAM TATUM, AND P. TATUM, PLAINTIFFS IN ERROR,

vs.

HENRY S. CARTER AND JACOB BECKER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

Oct 2 1876
Gibson
for Davis

FILED SEPTEMBER 11, 1874.

SUPREME COURT OF THE UNITED STATES.

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a UNITED STATES OF AMERICA, ss:

[SEAL.] The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Missouri, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the March term, 1874, thereof, between Mary Ryan, Louis S. Le Bourgeoise, Elizabeth C. Le Bourgeoise, Charlotte T. Charless, William Walker, Mary Walker, Frank A. Rector, Thomas H. Rector, William Tatum, and Pelagie Tatum, plaintiffs, and Henry S. Carter and Jacob Becker, defendants, a manifest error hath happened, to the great damage of the said plaintiffs, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this twenty-seventh day of June, in the year of our Lord one thousand eight hundred and seventy-four.

Issued at office in the city of St. Louis, with the seal of the circuit court of the United States for the eastern district of Missouri, dated as aforesaid.

AUSTIN DRAKE,
Clerk C. C. U. S., E. Dist. Mo.
By H. C. GEISBERG,
Deputy.

Allowed by—

SAMUEL TREAT, *Judge.*

b UNITED STATES OF AMERICA,
Eastern District of Missouri, sct.:

In obedience to the within writ of error, I herewith transmit to the Supreme Court of the *of the* United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

Witness my hand, at office in the city of St. Louis, in said district, this 29th day of June, A. D. 1874.

AUSTIN DRAKE,
Clerk U. S. Circuit Court, East Dist. Mo.
By H. C. GEISBERG,
Deputy.

(Indorsed:) United States circuit court, eastern district of Missouri. Mary Ryan et al., P. E., vs. Henry S. Carter et al., D. E. Writ of error to the circuit court of the United States for the eastern district of Missouri. Returned and filed, 1870, , clerk.

c The United States of America to Henry S. Carter and Jacob Becker, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Missouri, wherein Mary Ryan, Louis S. Le Bourgeoise, Elizabeth C. Le Bourgeoise, Charlotte T. Charless, William Walker, Mary Walker, Frank A. Rector, Thomas H. Rector, William Tatum, and Pelagie Tatum are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Samuel Treat, judge of the circuit court of the United States for the eastern district of Missouri, this twenty-seventh day of June, in the year of our Lord one thousand eight hundred and seventy-four.

SAMUEL TREAT,
Judge United States Circuit Court, Eastern District of Missouri.

d ST. LOUIS, MO., *July 15th*, 1874.

We hereby acknowledge service of the within citation.

WILLIAMS & TITTMANN and
E. C. TITTMANN,
For Defendants.

(Indorsed:) United States circuit court, eastern district of Missouri. Mary Ryan et al., P. E., vs. Henry S. Carter et al., D. E. Citation. Filed , 1874, , clerk.

1 UNITED STATES OF AMERICA,
Eastern District of Missouri, sct.:

Pleas before the honorable the circuit court of the United States in and for the eastern district of Missouri, at the March term thereof, A. D. 1874.

PATRICK RYAN ET AL., PLAINTIFFS,
vs.
HENRY S. CARTER ET AL., DEFENDANTS. } Ejectment.

Be it remembered that heretofore, to wit, on the 25th day of August, A. D. 1873, there was filed in the office of the clerk of the circuit court of the United States for the eastern district of Missouri a petition in words and figures following, to wit:

Petition.

In the circuit court of the United States for the eastern district of Missouri, September term, 1873.

PATRICK RYAN, LOUIS S. LE BOURGEOISE, ELIZABETH C. Le Bourgeoise, Charlotte T. Charless, William Walker, Mary Walker, Frank A. Rector, Thomas H. Rector, William Tatum, Pelagie Tatum, Charles H. Murray, plffs.,
vs.
HENRY S. CARTER, JACOB BECKER, DEFTS.

Plaintiffs state that the plaintiff Patrick Ryan is a citizen of the

State of Iowa; that the plaintiffs Louis S. Le Bourgeoise, Elizabeth C. Le Buorgeoise, & Charlotte T. Charles are citizens of the State of Louisiana; that the plaintiffs William Walker, Mary Walker, William Tatum, & Pelagie Tatum are citizens of the State of Arkansas; that Frank A. Rector is a citizen of the State of Texas; that Thomas
2 H. Rector is a citizen of the State of California; that Charles H. Murray is a citizen of the State of New Jersey.

That the defendants are citizens of the State of Missouri; and that the plaintiffs were, on the 25th day of August, 1875, entitled, as owners n common, to the possession of certain premises, being a tract or parcel of land situate and lying in the county of St. Louis, Missouri, and known and described as follows, to wit, United States survey number four hundred and twenty-two.

And plaintiffs further state that, being so entitled to the possession of the above described premises, claimed as aforesaid, the defendants afterwards, on said 25th day of August, 1873, entered into said premises and unlawfully withholds from the plaintiffs the possession thereof, to the damage of the plaintiffs in the sum of one thousand dollars. Plaintiffs aver that defendants were in the possession of the above-described tract or parcel of land at the time of the commencement of this suit. Plaintiffs ask judgment against the defendants for the possession of the said premises, and damages for the detention thereof, and for the value of the rents and profits thereof, in the sum of one thousand dollars, and for the monthly rents and profits thereof, and for costs.

By D. T. JEWETT, *their Atty.*

Thereupon a summons issued in words and figures following, to wit:

Summons.

EASTERN MISSOURI DISTRICT, *set.:*

The President of the United States of America to the marshal of the eastern district of Missouri, greeting:

You are hereby commanded to summon Henry S. Carter and Jacob Becker, citizens of the State of Missouri, that they be and ap-
3 pear before the honorable circuit court of the United States for the eastern district of Missouri, on the first day of the next term thereof, to be holden at the city of St. Louis, in and for said district, on the third Monday of September next, then and there to answer the complaint of Patrick Ryan, a citizen of the State of Iowa; Louis S. Le Bourgeoise, Elizabeth C. Le Bourgeoise, & Charlotte T. Charles, citizens of the State of Louisiana; William Walker, Mary Walker, William Tatum, and Pelagie Tatum, citizens of the State of Arkansas; Frank A. Rector, a citizen of the State of Texas; Thomas H. Rector, a citizen of the State of California; and Charles H. Murray, citizen of the State of New Jersey, as set forth in the petition filed in said court on the 25th day of August, A. D. eighteen hundred and seventy-three.

Hereof fail not, and have you then and there this writ.

Witness the honorable Nathan Clifford, senior associate justice of the Supreme Court of the United States, the twenty-fifth day of August, A. D. eighteen hundred and seventy-three.

Issued at office in the city of St. Louis, under the seal of said circuit court, the day and year last aforesaid.

[SEAL.]

AUSTIN DRAKE,
Clerk of said Court.
By H. C. GEISBERG,
Deputy.

Upon the foregoing summons the marshal made the following return, to wit:

Marshal's return.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

Executed this writ by delivering a copy of the same, together with a copy of the petition, to the within-named Joseph Becker, at St. Louis County, within the eastern district of Mo., August 27th, 1873, and by delivering a copy of the summons to the within-named
4 Henry S. Carter, at St. Louis County, within the eastern district of Mo., August 28th, 1873.

C. A. NEWCOMB,
U. S. Marshal E. D. Mo.
By WILLIAM H. BIERSTADT,
Deputy.

And at the September term, A. D. 1873, of said circuit court, the following proceedings were had in this cause on Thursday, the 18th day of September, A. D. 1873, to wit:

PATRICK RYAN ET AL., PLAINTIFFS,
vs.
HENRY S. CARTER ET AL., DEFENDANTS. } Petition.

This day come the defendants, by their attorneys, and file their answer to the petition herein.

The answer filed as aforesaid is in the words and figures following, to wit:

Answer.

In the circuit court of the United States for the eastern district of Missouri, September term, 1873.

PATRICK RYAN, LOUIS S. LE BOURGEOISE, ELIZABETH C. LE BOURGEOISE, CHARLOTTE T. CHARLESS, WILLIAM WALKER, MARY WALKER, FRANK A. RECTOR, THOMAS H. RECTOR, WILLIAM TATUM, PELAGIE TATUM, and CHARLES H. MURRAY, plaintiffs,
vs.
HENRY S. CARTER AND JACOB BECKER, DEFENDANTS.

Now come the said defendants, by their attorneys, and, answering the petition of the plaintiffs, say that the said plaintiffs were not, nor was any one of them, on the 25th day of August, A. D. 1873, or at any time thereafter, nor are the said plaintiffs now, nor is any one of them, entitled to the possession of the tract or parcel of land in the said petition described; and the said defendants deny that they, or either of them, were at the time of the commencement of this suit in the
5 possession of all the tract or parcel of land in said petition described; but nevertheless the said defendants admit that at the time of the commencement of this suit the said defendants were and

now are in the possession of a part of the said tract or parcel of land, that is to say:

A tract or parcel of land situate, lying, and being in the county of St. Louis, in the State of Missouri, and in United States survey numbered four hundred and seventy-two, containing twenty-five acres, more or less, and bounded on the northwest by a road sometimes called Snead avenue, on the northeast by the northeastern line of said United States survey number four hundred and seventy-two, on the southeast by the centre line of Papin avenue, and on the southwest by land now or formerly owned by one January, being the most northeastern half of a tract of land containing fifty acres, which one Henry M. Shreve devised to the said defendant Henry S. Carter by will dated January the 6th, A. D. eighteen hundred and fifty-one, and duly proved and of record in the probate court for the said county of St. Louis.

And, further answering the said petition, the said defendants say that for twenty-four years next preceeding the commencement of this suit they and the persons under whom they claim and hold have been in open, notorious, continuous, and undisturbed, exclusive, and adverse possession of the tract or parcel of land hereinbefore last described, and that within the said twenty-four years no cause of action or right of entry for the possession of said tract or parcel of land hereinbefore last described has accrued to the said plaintiffs or either of them.

And, further answering the said petition, the said defendants say that for more than ten years next preceeding the commencement of this suit they and their grantors and privies in estate have been in open,

6 notorious, continuous, undisturbed, exclusive, and adverse possession of said tract or parcel of land hereinbefore last described.

Wherefore the said defendants pray that they be hence dismissed with their costs.

WILLIAMS, TITTMANN & LEE,
For Defendants.

And afterwards, at said September term, A. D. 1873, of said circuit court, the following further proceedings were had in this cause on Thursday, the 25th day of September, A. D. 1873, to wit:

PATRICK RYAN ET AL., PLAINTIFFS,
vs.
HENRY S. CARTER ET AL., DEFENDANTS. } Petition.

This day come the parties, by their attorneys, whereupon the defendants move the court for a continuance of this case until the next term of this court, for the reasons set forth in the affidavit this day filed in support of said motion, which motion is by the court sustained; and it is ordered that this case be now continued until the next term of this court, at the costs of said defendants, and that execution be issued therefor.

It is further ordered that said defendants be, and they are hereby, required to file abstracts and lodge with the clerk their title-papers on or before the first Monday, the 5th day, of January next.

And afterwards, at said September term, A. D. 1873, at said circuit court, the following further proceedings were had in this cause on Saturday, the 1st day of November, A. D. 1873, to wit:

PATRICK RYAN ET AL., PLAINTIFFS,
vs.
HENRY S. CARTER ET AL., DEFENDANTS. } Petition.

7 The order made herein on the 25th day of September is hereby

amended so that the defendants shall not be required to lodge with the clerk their title-papers at the time of filing their abstracts, as required by said order.

And afterwards, in vacation of said circuit court, the following further proceedings were had in this cause on Thursday, the 18th day of December, A. D. 1873, to wit:

PATRICK RYAN ET AL., PLANTIFFS,
vs.
HENRY S. CARTER ET AL., DEFENDANTS. } Petition.

This day come the defendants, by their attorneys, and file their abstract of title in this case, as required by the order of the court herein.

And afterwards, at the March term, A. D. 1874, of said circuit court, the following further proceedings were had in this cause on Tuesday, 24th day of March, A. D. 1874, to wit:

PATRICK RYAN ET AL., PLAINTIFFS,
vs.
HENRY S. CARTER ET AL., DEFENDANTS. } Petition.

This day come the defendants, by their attorney, on whose motion and the affidavit in support thereof this day filed, it is ordered that a subpœna duces tecum, returnable on the twenty-seventh instant, be issued against John F. Long, a witness on behalf of said defendants, and to bring with him a certain book of plats and surveys, which formerly belonged to Joseph Brown, a deceased surveyor, and containing the declarations of said surveyor as to the boundary-lines and locations of certain tracts of land.

8 And afterwards, at said March term, A. D. 1874, of said circuit court, the following further proceedings were had in this cause on Tuesday, the 7th day of April, A. D. 1874, to wit:

PATRICK RYAN ET AL., PLAINTIFFS,
vs.
HENRY S. CARTER ET AL., DEFENDANTS. } Petition.

This day come the parties, by their respective attorneys, the plaintiffs by Daniel T. Jewett, esquire, and the defendants by Edward W. Tittmann and Eugene C. Tittmann, esquires; and this case being regularly called for trial, and both parties being ready, and an agreement in writing, signed by counsel, having been this day filed waiving a jury, and that the issues may be tried by the court, said case was thereupon tried by the court sitting as a jury, and was submitted upon the pleadings & proofs; and not being fully advised in the premises, the court takes further time to consider thereof.

The agreement filed as aforesaid is in the words and figures following to wit:

Jury waiver.

PATRICK RYAN & AL., PLFF., *vs.* HENRY S. CARTER & AL., DEFTS. } No. 118.

In the circuit court of the United States, eastern district of Missouri.

In the above-entitled cause the parties, by their attys., hereby waive a trial by a jury, and submit the matters to be heard to the court.

D. T. JEWETT, *Atty. for Plff.*
WILLIAMS & TITTMANN AND
E. C. TITTMANN, *For Defts.*

And afterwards, at said March term, A. D. 1874, of said circuit
9 court, the following further proceedings were had in this cause on Friday, June 5th, A. D. 1874, to wit:

PATRICK RYAN ET AL., PLAINTIFFS, *vs.* HENRY S. CARTER ET AL., DEFENDANTS. } Petition.

This day come the parties, by their respective attorneys, whereupon the attorney for said plaintiffs suggests to the court the death of Patrick Ryan, one of said plaintiffs, and asks that Mary Ryan, wife of the said Patrick, be substituted as plaintiff in his stead; and thereupon the said Mary enters her appearance as such plaintiff in this case.

On the further motion of said attorney for plaintiffs, it is ordered that this suit be dismissed as to Charles H. Murray, one of the plaintiffs in the petition mentioned; and thereupon this cause is again submitted to the court and taken under advisement.

And afterwards, at said March term, A. D. 1874, of said circuit court, the following further proceedings were had in this cause on Monday, the 8th day of June, A. D. 1874, to wit:

Finding & judgment.

MARY RYAN ET AL., PLAINTIFFS, *vs.* HENRY S. CARTER ET AL., DEFENDANTS. } Petition.

This day come the defendants, by their attorney, and this case having been heretofore tried by the court sitting as a jury, and having been argued by counsel for the respective parties and submitted upon the pleadings and proofs, on consideration whereof, and the court being now fully advised in the premises, it finds for the defendants on the issues joined, and returns a special finding of the facts as proven and admitted at the trial, which is ordered to be filed and made a part of the record in this case.

10 It is therefore now considered by the court that the plaintiffs Mary Ryan, Louis E. Le Bourgeoise, Elizabeth C. Le Bourgeoise, Charlotte T. Charless, William Walker, Mary Walker, Frank A. Rector, Thomas H. Rector, William Tatum, and Pelagie Tatum are not entitled to recover the real estate and premises in their petition mentioned and described, and that said plaintiffs take nothing by their writ herein,

and that the defendants, Henry S. Carter and Jacob Becker, go hence without day and recover against said plaintiffs the costs in this behalf expended, and that execution be issued therefor.

And afterwards, at said March term, A. D. 1874, of said circuit court, the following further proceedings were had in this cause on Monday, the 8th day of June, A. D. 1874, to wit:

MARY RYAN ET AL., PLAINTIFFS,
vs.
HENRY S. CARTER ET AL., DEFTS. } Petition.

This day come the plaintiffs, by their attorney, D. T. Jewett, esquire, and file a motion for a new trial in this case for the reasons set forth in said motion; which having been considered by the court, it is ordered that said motion be, & the same is now hereby, overruled; and on motion of said attorney, leave is granted said plaintiffs to file their bill of exceptions within ten days from this date.

And afterwards, at said March term, A. D. 1874, of said circuit court, the following further proceedings were had in this cause on Wednesday, the 10th day of June, A. D. 1874, to wit:

MARY RYAN ET AL., PLAINTIFFS,
vs.
HENRY S. CARTER ET AL., DEFENDANTS. } Petition.

11 This day come the plaintiffs, by their attorney, D. T. Jewett, esquire, and present their bill of exceptions in this case, which is signed by the honorable Samuel Treat, one of the judges of this court who presided at the trial, and is by said judge ordered to be filed and made a part of the record herein.

The bill of exceptions filed as aforesaid is in the words and figures following, to wit:

Bill of exceptions.

In the circuit court of the United States for the eastern dis. of Missouri, March t., 1874.

PATRICK RYAN & OTHERS, PLFFS.,
vs.
HENRY S. CARTER & AL., DEFTS.

Be it remembered that on the trial of the above-entitled cause a jury was waived upon a stipulation in writing, signed by the parties and filed with the clerk, & the cause was tried by the court without the intervention of a jury, and the court made a special finding of facts, as hereinafter set forth.

After the plffs. had closed their case the defendants offered in evidence a certified copy, from the office of the recorder of deeds of St. Louis County, of a conveyance of August Dodier & wife to Louis Lebaume, dated January 18th, 1805, & acknowledged May 10, 1816, & recorded in the registry of deeds of St. Louis County, June 5th, 1816, which deed is set out in full in the special finding of the court.

To the admission of the same in evidence the plffs. objected—

1st. That the deed was made and executed before the passage of the act of Congress of March 5th, 1805, creating a board of commissioners for adjusting land-titles in Missouri, and never was filed with the recorder of land-titles or laid before the board of comms. created by said act, as required by the provisions of said act, & that therefore
12 said deed or conveyance could not be used as evidence in this case.

2d. That the grantors did not affix any seal to it, & it was therefore not a deed under the common law, & was of no force or effect as a deed or conveyance in May & June, 1816, when it was acknowledged and recorded in the county records.

3d. That under the statutes of Missouri it was not entitled to be acknowledged or recorded as a deed or conveyance in May & June, 1816, and therefore no copy of it from the records of St. Louis County was admissible in evidence.

All of which objections the court overruled, & admitted the copy in evidence, to which ruling of the court the plffs. then and there excepted.

The defendants then offered to prove that survey 422 was a common-field lot or out-lot "in, adjoining, and belonging to the town or village of St. Louis," within the meaning of the act of Congress of June 13th, 1812, confirming such common-field lots & out-lots to the different towns & villages in the State of Missouri, & that said lot was inhabited and cultivated by August Dodier before 1803.

To the introduction of any testimony upon that subject the plffs. objected because the land, known as survey 422, in controversy was confirmed to August Dodier by the board of commissioners, acting under the acts of Congress of March 5th, 1805, and 1806 and 1807, & that upon any such land the said act of June 13th, 1812, was wholly inoperative, & such testimony was irrelevant & incompetent in the case; but the court overruled the objections, & admitted evidence on those points, to which ruling of the court the plffs. then and there excepted. The defts. then offered and read in evidence the deposition of Joseph Hortiz as follows:

13 *Deposition of J. B Hortiz.*

Deposition of John B. Hortiz, taken by Simon Obermeyer, a duly commissioned notary public for St. Louis County, Missouri, on the 14th day of February, A. D. 1874.

JOHN BAPTISTE HORTIZ, of lawful age, being produced, cautioned, duly sworn, and examined, deposes and says as follows:

Examination by Mr. E. W. Tittmann:

My name is John Baptiste Hortiz. If I shall live to see the 11th day of March next, I shall be eighty-three years old. I was born in 1791. I have been living in St. Louis ever since I was a month and a half old. I was born in St. Genevieve, Missouri.

1 in. Did you ever know one Auguste Dodier?

Ans. Yes, sir; I knew him.

2d in. Where did you first become acquainted with him?

Ans. As far as I can recollect, it was about the year 1800, when he was living here in St. Louis.

3d in. How did you happen to become acquainted with him?

Ans. By visiting him as a relation of his. I was with him more or less every day or two. I was a boy living around there; he lived near us.

4th int. When he lived near you, as you say, where did you live?

Ans. I lived on the corner of Main and Myrtle street.

5th int. Did he continue to live there as long as you knew him?

Ans. I believe that he moved from there before we moved on to our farm, which was between 1800 and 1806.

6th int. When you say that he removed from there, what do you mean?

Ans. I mean this: he moved from Myrtle and Third streets,
14 where he was living after having sold his place there to Vincent Guitard.

7th in. Can you fix the time when he moved any more definitely than you did before, or can you fix it only by the sale which he made to Vincent Guitar; and, if so, how soon after the sale to Vincent Guitar did he move?

Ans. I was not a witness to the sale, and only know it from their say, and I can only say that it was some time between 1800 and 1806.

8th in. From whom did you hear that Auguste Dodier sold his place to Vincent Guitar?

Ans. From the family of Auguste Dodier, and from our family.

9th i. Did he or did he not move shortly after that sale to Vincent Guitar?

Ans. I cannot tell positively whether it was a while before or a while after.

10th in. Where did Auguste Dodier move to when he did move, as you have before stated?

Ans. As far as I know, I was going to school at the time, and did not go so very often to his house. Then I found out that he had moved to Marais Castor, or Beaver Pond, by going out there with my oldest brother.

11th in. When you went out there, whom did you see there; and did or did you not see any of Auguste Dodier's family?

(The last part of the foregoing question is objected to by counsel for plaintiff as being leading and suggestive.)

Ans. I saw the family there; my cousin Auguste Dodier and his wife.

12th in. Had they or had they not made a settlement upon the place, or improvements?

Ans. When I first saw the place they had a house there, and
15 they were cultivating the grounds, and there was an orchard and a fence there.

13th in. Was that shortly or long after they removed from their old place that you went out there with your brother?

Ans. Well, sir, it was between the time that he moved out there and that we moved out upon our farm. Every day that we had vacation, on Thursdays, we went out there to get wood, and my brother took me along.

14th in. When was it that you removed to your farm, as you say?

Ans. In the year 1806.

15th in. What time in 1806?

Ans. In the fall of that year.

16th in. Do you remember when the American Government took charge of this post?

Ans. Yes, sir.

17th in. Do you remember whether or not Auguste Dodier moved to Marais Castor before the change of Government?

Ans. I have told you already that he moved between 1800 and 1806; that is as near as I can tell you; I don't remember the exact time.

18th in. You spoke of having gone out to August Dodier's place at

Marais Castor before the year 1806, and that he then had an orchard. Do you remember in how many years you were there?

Ans. I don't remember that; I did not count the day or the month when I went there, or the years.

19th in. Do you remember when going out to Auguste Dodier's place before 1806, or ever having eaten any fruit from his orchard?

Ans. I eat apples there, I am positive, before we moved out to our farm in 1806. My cousin, Auguste Dodier, brought them to me
16 in a basket, and he said that the apples were out of the orchard.

20th in. You spoke of going out to Auguste Dodier's place at Marias Castor with your brother to get wood. Were other people of the village in the habit of getting wood there before the change of Government?

Ans. The most of the people of the village at that time were in the habit of getting wood anywhere they pleased, but they were forbidden to cut down valuable timber, such as was used for coopering, or wagon-making, and so on.

21st in. Was this Marais Castor tract on to which Auguste Dodier moved, one of the places where the people of the village got their wood, as you have stated?

Ans. My brother cut wood on the Marais Castor tract; whether other persons did or did not I cannot say; but they all said that they cut their wood at Cote Brilliant and Marias Castor.

22 in. Were or were not all these tracts and settlements that you have spoken about a part of the same community with what you call the village of St. Louis?

Ans. Yes, they were; certainly.

23d in. Do you know whose tracts of land adjoined the Marias Castor tract of Auguste Dodier, of which you have spoken?

Ans. Governor Clark's tract adjoined on the east side of Auguste Dodier's tract. In speaking of Governor Clark's place, I mean the place which Auguste Dodier sold to Governor Clark.

24th. Do you remember who were the adjoining proprietors of land who bounded on Auguste Dodier's tract; the whole of that tract, I mean?

Ans. Watkins' tract was southeast of Dodier's?

25th in. Did you know Philip Riviére, or his family?

17 Ans. His name was Philip Riviére dit Bacanné. Two-thirds of the people did not know his name was Riviére; they called him Bacanné.

26th int. Have you since 1806 been on the tract which you call Dodier's Marais Castor tract, so that you can explain more definitely where it is situated?

Ans. All that I can say is that I have been at his house on that tract. It is about five miles from the court-house. The last time I was out there there was a new plank-road, which passes along the south line of his tract.

27th in. Did you know the name of that road?

Ans. It is called the Florissant plank-road.

28th in. Did you know Louis Le Beaume, sr.?

Ans. I knew Louis Le Beaume, sr., and he is dead.

29th in. When you saw the orchard of Auguste Dodier before the year 1806, how old did the orchard appear to you to be?

Ans. I did not see. I paid no attention to the orchard before the year 1806. After we moved out to our farm I saw the orchard. The trees appeared to be three or four or five inches through. I can't tell how old the trees were.

Cross-examination by Mr. D. T. Jewett:

1st in. Do you remember how many children Auguste Dodier left living when he died?

Ans. I can't tell you exactly how many were then living.

2d int. Name all that you remember to have been living after he died?

Ans. There was Charles, Joseph, and Gabriel. I knew of only one who died before the old man; that was Augustine. As far as I
18 remember I don't remember any more sons.

3d in. Name the girls, daughters of Auguste Dodier, that were alive at his death.

Ans. There were Cecile, Pelagie, and Emilie. Emilie married a Paquette and the others married Vasseurs.

4th in. How soon after the old man died did Gabriel die?

A. I cannot tell. I do not remember.

5th in. Do you know whether Gabriel had any wife or children?

Ans. I don't know that he ever was married.

6th in. Did you ever know the wife of Charles Dodier?

Ans. I knew her after she was married, but I cannot tell her family name.

7th in. How did that family, Dodier, spell their name?

Ans. D-o-d-i-é, with an accent, acute, on the top of the e. Some spelt it D-a-u-d-i-é. Some of the French—Creole French—called it Doyie—D-o-y-i-e—spelling it with a y instead of a d.

8th in. Did they call themselves any other name than Dodié?

Ans. I never knew that they called themselves by any other name than Dodié. Some people called them Doyié and Marais Castors. The children were all uneducated and stupid.

9th in. Do you know how many children Pelagie Vasseur left alive when she died?

Ans. I do not know anything about the children's children.

10th in. Was not this Mavais Castor land that Dodié lived on outside of what was known as the commons or common-fields of St. Louis?

A. As far as I know the commons or common-fields of St. Louis did not reach that far. I can tell you as far as I know about it. The commons or common-fields started up by the demi-lune, up by Cherry
19 street, and went as far west as the King's Highway. South they went as far as the Grand Couleé (the Big Drain) between Carondelet and St. Louis, near Sugar-Loaf mound.

11th in. How far was it in those days from King's Highway to Dodiér's place at Marais Castor?

Ans. I do not know the distance. Marais Castor was north of King's Highway.

12th in. Can you say whether it was anywhere near—whether it was one mile or more?

A. I cannot say.

13th in. Did you ever know one John Bent in this city?

Ans. Yes, sir.

14th in. How long ago is it that you knew him?

Ans. I don't know how long. I knew him ever since he came to the country. I remember that he was here as early as 1822, and he might have been here before, but I don't remember.

15th in. Do you know how long John Bent lived here in this city after 1822?

Ans. He always lived here after that. He was a lawyer, and I think he died here.

16th in. Do you know whether John Bent was well acquainted with Auguste Dodiér's children?

Ans. There were three of the Bents that were well acquainted with the children of Auguste Dodiér. They were John, Charles, and William Bent.

17th in. Did you ever know a man by the name of John Babtiste Beaufils in this town?

Ans. I knew him very well. He was a partner of mine. I knew also his brother, Joseph Beaufils.

20 18th in. How early did you know John Baptiste Beaufils, and how late did you know him in this town?

Ans. In 1811 he was a partner with me. In 1812, early in the spring, we dissolved partnership. He continued to live here. He got married directly after we dissolved partnership. He died here, I believe, sometime affout 1829, or later.

19th in. Do you know whether John Baptiste Beaufils was well acquainted or not with the children of August Dodier?

Answer. He was acquainted with them. I don't know whether he was well acquainted with them. Auguste Dodier's children used to come very frequently to Beaufils' to play.

20th in. Did he continue to know them until he died?

Ans. I believe so, but I cannot tell certainly.

21st in. Did you ever know, from 1825 to 1829, Garvais Nolan?

Ans. I never knew such a man.

Re-examination by Mr. E. W. Tittmann:

1st in. You stated that Emilie Dodier, daughter of Auguste Dodier, married a man by the name of Paquette. Did you ever know of any other man here of that name other than the one who married her?

Ans. I knew only one other one, and that Paquette, I was told, was the father of the Paquette who married Emilie Dodier.

2d in. You stated in your cross-examination, in answer to Mr. Jewett, that the children of August Dodier were uneducated. Were they, so far as you know, able to spell their names themselves correctly?

Ans. I do not know whether they could or could not. May be Charles or Joseph could after they became of age, but I don't know. I

21 am certain none of the others could.

3d in. When you stated how their names were spelt in different ways, do you mean to say that the family themselves spelt their name in such ways, or did you mean that others did who knew them?

Ans. I never knew that the old stock of the Dodiers ever spelt their name differently than D-o-d-i-é; I never knew it spelt any other way; but the Creole people sometimes called it D-o-y-i-é.

4th in. Did you ever hear or see any of the children of Auguste Dodier spell their name?

Ans. Never in my life.

Recross-examination by Mr. D. T. Jewett:

1st in. What relation are you to the Auguste Dodier about whom we have been inquiring?

Ans. We always called him cousin. I'll tell you our relation: My grandfather married a Dodier; then this Auguste Dodier, I think, because I have it from hearsay, was a son of my grandmother's sister.

2d in. Did you ever know any of Auguste Dodier's family pronounce

their name as if it was spelt with a g, so as to sound as if it was spelt D-o-g-é?

Ans. I never did.

(Signed) JOHN BT. HORTIZ.

Also the evidence of Michell.

Testimony of Michel.

HENRY MICHELL, called for the defendants, being duly sworn, testified as follows:

22 Direct examination by Mr. Tittmann:

Q. What is your business?

A. Florist.

Q. Have you ever done anything in the way of raising orchards or trees?

A. Yes, sir; up to within a few years ago.

Q. Are you well acquainted with the nature of them and the manner of raising them?

A. Yes, sir.

Q. How long have you done that, sir?

(Objected to.)

Q. How long after an apple-orchard is planted will it bear?

(Objected to.)

Q. How long after an apple-orchard is planted does it bear fruit for general use?

A. For general use it will be six years—six to eight.

Q. That would be the ordinary way of planting an orchard?

A. Yes, sir; you may get a little fruit earlier, but not any crop.

Q. How old would an orchard of apple-trees be when the trees are from three to six inches in diameter?

A. They would not be less than five to six years.

Cross-examination by Mr. Jewett:

Q. Can't you set out apple-trees after they get to be four or five years, so they will bear fruit in two, three or four years after they are set out?

A. They may, under very favorable circumstances.

Q. Don't it often occur that they will bear in two or three years?

A. No, sir; in some years you may get some fruit.

23 Re-examination by Mr. Tittmann:

Q. That would not be in the ordinary way of planting trees for a farmer's use?

A. They would want better cultivation than they usually get.

Q. Is that ever done, practically, for the purpose of raising an extensive orchard?

A. No, sir; not for a large orchard.

Mr. JEWETT. Is it never done?

A. It is frequently done in private places where they want only one or two trees?

Q. It could be done with fifty or twenty-five?

A. A great many things can be done.

Defts. also offered and read in evidence certain copies of concessions of common-field lots from livre terrein, (Spanish records made in 1769,) & also offered as a witness William H. Cozzens, who testified that he

was an experienced surveyor, having been in that business in St. Louis since 1835; that he had at former times surveyed those locations upon the face of the earth, & that from those surveys had constructed the plat made by him and exhibited to the court, & made a part of the special findings of the court.

To the admission of this evidence the plffs. objected that it did not appear that those concessions were ever acted upon or surveyed by the Spanish government; that Mr. Cozzens' survey was but the opinion of a private individual; & that no such survey had ever been recognized by the United States.

But the court overruled said objections, admitted the evidence, & the plffs. then and there excepted.

24 After the deft. rested in his defense, the plffs. then put in evidence the record of the partition-suit of Louis Le Beaume against the Dodiers, widow & children, after the death of Auguste Dodier, the same set out in the special finding of the court.

In reply to that the defts. offered in evidence the deeds of Cecile Vasseur to O'Fallon and those following, as set out in the special finding of the court.

To the introduction of which plff. objected that neither the defts. or those under whom they claim were parties or privies to said deeds, & that many of plffs. were strangers to them, & that the recitations in them were not competent evidence in this case.

But the court overruled the objections, & the plffs. then and there excepted.

Upon all the evidence in the case the court made a special finding of the facts as follows, & rendered judgment for defts:

Special findings of fact by the court.

In the circuit court of the United States for the eastern district of Missouri.

PATRICK RYAN ET AL.
vs.
HENRY S. CARTER ET AL.

In this case a jury was waived upon a stipulation signed by the attorneys of record for the respective parties, filed with the clerk, and the cause was tried by the court without the intervention of a jury. Thereupon the following facts were found by the court, viz:

On October 13th, 1800, Auguste Daudier (alias August Dodier) petitioned Charles Dehault Delassus, lieut. governor of Upper Louisi-
25 ana and subdelegate, for a grant of land about four or five miles west of the village of St. Louis. On October 14th, 1800, the same was conceded by said Delassus. A survey and plat of the land so conceded was made by Antoine Soulard, surveyor under the Spanish government, which was certified by him December 10, 1800, and was recorded by said Soulard in the record-book of surveys, called "Register d'Arpentage," prior to May 25th, 1803, as appears by the said petition, concession, and survey here copied.

Claim.

Augustin Daudier claims to hold, under the 2d section of the act of Congress, 500 a. of land, situate on the Beaver Swamp, by a permission

from the Spanish gov'nt to settle, the said land having been inhabited and cultivated prior to & on the 20th Dec'r, 1803.

AUGUSTIN DAUDIER.

Petition.—Translation fr. the French.

To Charles Dehault Delassus, lieut. colonel, attached to the fixed regim't of Louisiana, and lieut. gov'or of the upper part of the same province:

Auguste Daudier, one of the most ancient inhabitants of this town, whose family is composed of himself, his wife, and six children, considering that the cultivation of land in common being detrimental, is now entirely abandoned; that the lands near us (abandoned) are conceded, and that it becomes every day more difficult to procure wood and to cultivate land, has the honor to beg of you to be so kind as to grant him the quantity of land corresponding to his family, according to the regulations of the government; the aforesaid land being situate at about four or five miles west of this town, at the end of the land of the second concession, adjoining to the north line of land of Dr. Watkins, upon the third concession, and joining by its depth to the land of Philippe Rivière. The petitioner, having always behaved himself as a peaceful and submissive subject, dares hope from your kindness the boon which he solicits. St. Louis, October 30th. 1800.

his
AUGUSTE × DAUDIER.
mark.

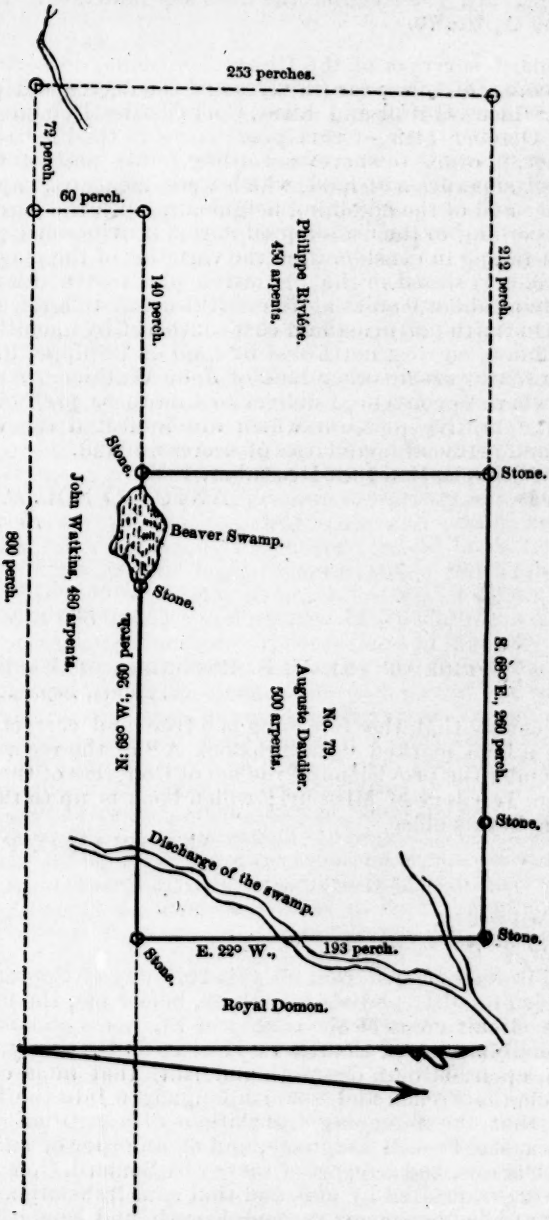
26 *Concession.—Translation fr. the Spanish.*

ST. LOUIS OF ILLINOIS, *October 14th, in the year* 1800.

Whereas the petitioner is ancient in this country, and the members of his family mentioned in his petition exist, therefore the Surveyor Ant. Soulard shall put him in possession of 500 arpents in superficies, in that place which he begs, said quantity of land corresponding to the number of his family members, according to the regulations of the gov'or-gen'l of this province, according to which the interested must solicit the title of concession in form from the intend't-gen'l of these provinces, to whom, by order of her majesty, belongs the authority of partaking and granting all class of land of royal dominion.

CHARLES DEHAULT DELASSUS.

Upper Louisiana, district of St. Louis of Illinois.



REC. 246—2

NOTA.—The limits placed at every angles and boundaries at every 20 arpents distant, all indicated in the figurative plat and cemented with smithy cinders. All the trees on the lines are indicated. Entered fo. 40 of the book A, No. 79.

I, Ant. Soulard, surveyor of the Upper Louisiana, do certify that on the 1st Decemb'r of this year (in vertue of the decree and petition to it annexed, of Lieut. Gov'or and Lieut. Col'l Charles Dehault Delassus, dated October 14th of this year) came to the land of Auguste
27 Daudier, in order to survey according to his petition for 500 arpents of superficies of land, which were measured in presence of the said owner and of the adjoining neighbours, with the perch of Paris of 18 feet, according to the use adopted in this province of Upper Louisiana, without taking in consideration the variation of the magnet, which is 7° 30′ E., as it is stated in the figurative plat above drawn; which land is situate at about 6 miles at the northwest of this town, bounded as follows: On north-northeast and east-southeast by uncultivated land of royal dominion, on west-northwest by land of Philippe Rivière, and on the south-southwest by other land of John Watkins. And in order to ascertain where to convene, I deliver to him these presents with the above-drawn figurative plat, on which are indicated the dimensions and natural and artificial boundaries of aforesaid land.

St. Louis of Illinois, this 10th December, 1800.

(Signed) ANTONIO SOULARD,
Survey. Par.

Granted to the above
500 a. of land.

OFFICE OF THE U. S. RECORDER OF LAND-TITLES,
St. Louis, Sept. 12, 1873.

This is to certify that the foregoing is a true and correct copy from page 326, of a book marked "Record-Book A" of the recorder of land-titles, kept under the provisions of the act of Congress of the 2d March, 1805, for the Territory of Missouri; which book is up to this day preserved on file in this office.

STILLMAN O. FISH,
Recorder.

STATE OF MISSOURI,
County of St. Louis, ss:

28 Be it remembered that on this 20th day of September, A. D. eighteen hundred and seventy-three, before me, the undersigned, clerk of the circuit court of the county of St. Louis and State of Missouri, personally appeared Charles Le Mercier de Pombiray, who, being duly sworn, upon his oath deposeth and saith that he is competent to translate from the French and Spanish languages into the English language, and that the foregoing translations of a petition by Auguste Daudier from the French language, and of an order of survey or concession by Delassus, and a report of survey by Soulard, from the Spanish language, were translated by him, and that said translations are correct translations of the documents in said French and Spanish languages hereto attached.

CH. L. M. DE POMBIRAY.

Subscribed to before me on the day and year last aforesaid. Witness my hand and the seal of said court the day and year last above written.

{ SEAL OF ST. LOUIS CIRCUIT COURT. } JNO. LEWIS, *Clerk.*

The said Auguste Dodier and Pelagie Bacanné, his wife, in their lifetime, made the following conveyance to Louis Lebeaume, which bears date January 18th, 1805, was by the said grantors duly acknowledged on May 10th, 1814, and recorded in the office of recorder of deeds of St. Louis County on June 5th, 1816; which conveyance, together with the certificates of acknowledgement and record thereof, is in the words and figures as follows, as appears from the certified copy of the records thereof, viz:

Deed from Aug. Dodier and wife to Louis Lebeaume.—Translation fr. the French.

Be it known to all who shall see these presents, that we, Auguste Dodier and Pelagie Bacanné, authorized to act as a party hereto by my husband,
Auguste Dodier, stipulating for us, our heirs, or legal representa-
29 tives, *we* have sold, ceded, relinquished, transferred, and abandoned, as by these presents we do sell, cede, relinquish, transfer, and abandon, now and forever, and promise to warrant against all troubles, gifts, debts, dowers, mortgages, ejectments, and entails, and against all other encumbrances generally whatsoever, to said Louis Labeaume, purchaser for him, his heirs or legal representatives, the quantity of six arpents of land in front by twenty-six arpents of land in depth, making in all a superficies of one hundred and twenty-six arpens, which quantity forms part of a concession of nineteen arpens of land in front by twenty-six in depth, which has been granted to us by Dn. Cs. Dehault Delassus, lieut. governor of Upper Louisiana, the fifth day of the month of January, in the year eighteen hundred, as it appears by the original title, which is in our hands, the said land being situated at about six miles from this town, in the place called "Marais Castor," which land has been surveyed, and the plat thereof recorded in the office of the surveyor of Upper Louisiana, selling to said Louis Labeaume the six arpens of land in front by twenty-six arpents in depth, to be taken in the most eastern part of the aforesaid concession, on condition that of the six arpents in front there shall be one-half—that is to say, three arpents in front by twenty-six arpents of land in depth—timbered, adjoining the said Philippe Bacanné on the northwest, and on the southwest the balance of the land which have been granted to us, as it is before mentioned. The present sale, made and executed for the price and sum of one hundred and fifty-six Mexican dollars; which sum has been paid in cash by the said Louis Labeaume, as it is hereby acknowledged, and from which sum we release and discharge him. Therefore we desseize ourselves, desist, cede, and abandon all our rights,
30 titles, actions, possessions, and properties which we have ther'to, without any reservation on our part, our heirs or legal representatives, we do sell, cede, relinquish, transfer, and abandon them to said Louis Labeaume, for him, his heirs or legal representatives, to hold, dispose of, sell, or alien at his will, and as of property to him belonging, promising and binding ourselves to acknowledge and ratify the present sale before a competent judge as soon as we shall be required so to do.

In testimony whereof, knowing not how to sign, we have made our customary mark, which is a cross, in presence of the undersigned, at St. Louis of the Illinois, the eighteenth day of the month of January, in the year eighteen hundred and five.

his
AUGUSTE + DODIER.
mark.
her
PELAGIE + BACANNÉ.
mark.

Witnesses:
ALBERT TISON.
FREMON DELAURIÈRE.

TERRITORY OF MISSOURI,
County of St. Louis, Township of St. Louis, ss:

Be it remembered that on this tenth day of May, one thousand eight hundred and sixteen, before me, the subscriber, one of the justices of the peace for county aforesaid, personally appeared the above-named Auguste Dodier and Pelagie Bacanné, his wife, who acknowledged to have executed the foregoing deed of conveyance for the purposes and for the consideration therein named, being made acquainted by me with the contents. And the said Pelagie Bacanné, being separately and apart examined from her husband, voluntarily relinquishes all right and interest of dower which she might claim to the premises, and says that she does so without fear or constraint of her husband.

Given under my hand at St. Louis, day and date above written.

THOS. J. RIDDICK, *J. P.*

31 Recorded this 5th day of June, 1816.

M. P. LEDUC, *Clk.*

STATE OF MISSOURI,
County of St. Louis, ss:

I, the undersigned, recorder of deeds for said county, certify the foregoing to be a true and correct copy of an instrument of writing from Auguste Dodier and Pelagie Bacanné, his wife, to Louis Labeaume, of the certificate of acknowledgment, the date of filing and recording thereof, and of the translation of the same, as fully as the same remains of record in my office, in book E, page 511.

Witness my hand and official seal this seventeenth day of September, A. D. 1873.

[SEAL.] W. C. KENNETT, *Recorder.*

The original of said conveyance is lost, and not in the power or control of the defendants, and the said original was not sealed by the grantors.

On February 17th, 1806, the land conceded and surveyed by Soulard was confirmed to Auguste Daudier by the board of commissioners for ascertaining and adjusting the titles and claims to land in the Territory of Louisiana, as appears by the minutes of said board here copied.

Commissioners' minutes, Feb'y 17, 1806.

FEBRUARY 17TH, 1806.

The board met agreeably to adjournment. Present, the honorable Clement B. Penrose & James L. Donaldson, esq'rs.

Auguste Daudier, claiming under the 2d section of the act of Congress five hundred arpens of land, situate Beaver Swamp, produces as a special permission to settle a concession from Charles D.
32 Delassus, dated October 14th, 1800, and a certificate of survey dated December 10th, 1800.

Antoine Rivière, being duly sworn, says that the said claimant did, prior to & on the 20th day of December, 1803, actually inhabit and cultivate the said tract of land.

The board grant the above claimant 500 arpens of land as per his concession.

On motion, adjourned to to-morrow, 10 o'clock a. m.

CLEMENT B. PENROSE.
JAS. L. DONALDSON.

OFFICE OF THE U. S. RECORDER OF LAND-TITLES,
St. Louis, August 30th, 1873.

This is to certify that the above is a true and correct copy or extract from page 95 of a book marked "Minutes 1" of the proceedings of the U. S. commissioners under the act of Congress of the 2d March, 1805, which book is up to this day preserved on file in this office.

STILLMAN O. FISH,
Recorder.

Said Dodier filed the claim with the U. S. recorder of land-titles; and thereafter, on July 31st, 1810, the following proceedings were had by said board:

TUESDAY, *July 31st*, 1810.

Board met. Present, John B. C. Lucas, Clement B. Penrose, Frederick Bates, commissioners.

Certificate No. 422.

Auguste Dodier, claiming 500 arpens of land. See book No. 1, page 95.

The board grants to Auguste Dodier five hundred arpens of land, as described in a plat of survey certified the 10th December, 1800,
33 and to be found of record in book A, page 326, of the recorder's office.

Board adjourned till Saturday next, 3 o'clock p. m.

JOHN B. C. LUCAS.
CLEMENT B. PENROSE.
FREDERICK BATES.

OFFICE OF THE U. S. RECORDER OF LAND-TITLES,
St. Louis, August 30th, 1873.

This is to certify that the above is a true and correct copy or extract from page 452, of a book marked "Minutes 4" of the proceedings of the U. S. commissioners under the act of Congress of the 2d March, 1805; which book is up to this day preserved on file in this office.

STILLMAN O. FISH, *Recorder.*

And a certificate of confirmation was issued by the board to said Dodier of the same date:

Commissioners' certificate No. 422.

LOUISIANA:

Commissioners' certificate No. 422, July 31, 1810.

We, the undersigned, commissioners for ascertaining and adjusting the titles and claims to lands in the Territory of Louisiana, have decided that Auguste Dodier, original claimant entitled to a patent, under the provisions of the 2d section of an act of the Congress of the United States entitled "An act for ascertaining and adjusting the titles and claims to land within the Territory of Orleans and the district of Louisiana," passed the second day of March, one thousand eight hundred and five, for five hundred arpens of land, situate in the district of St. Louis, on Beaver Pond, as described in a plat of survey certified the tenth of December, one thousand eight hundred, and to be found of record in book A, page three hundred and twenty-six, of the re-
34 corder's office, by virtue of a permission from the proper Spanish officer, and also of actual inhabitation and cultivation prior to and on the 20th day of December, one thousand eight hundred and three.

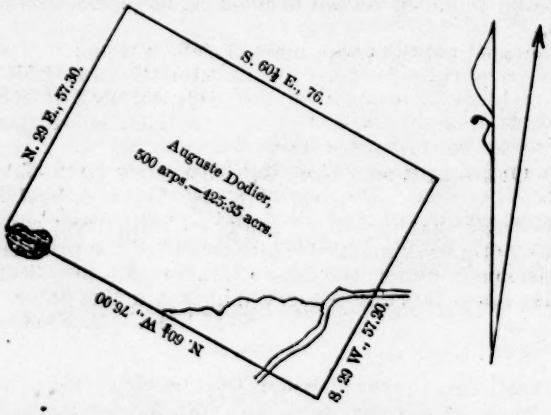
JAMES B. C. LUCAS.
CLEMENT B. PENROSE.
FREDERICK BATES.

OFFICE OF THE U. S. RECORDER OF LAND-TITLES,
St. Louis, Aug. 26th, 1803.

This is to certify that the above is a true and correct copy from the commissioners' certificate No. 422, which commissioners' certificate is up to this day preserved on file in this office in a book marked "Commissioners' certificate, 401—600."

STILLMAN O. FISH, *Recorder*.

And in November, 1817, the land was surveyed by the deputy U. S. surveyor, Joseph C. Brown, as United States, No. 422, as appears by the minutes, certificate, and survey here copied.



No. 422. Surveyed for Auguste Dodier 500 arpens, equal to 425.35 acres, beginning at the old stone, his S. E. corner, at the end of the common-fields; thence N. 60½ W. 14 chains a creek 15 lks. bears N. E. 40.00 chains, Spring Branch, where crossed township line, 76.00 ch., a red oak 15 in. dia., the S. W. corner at the west end of a flag-pond; thence N. 29 E. along an old line 57 ch. 30 l., a post set in Francis St. Cyr's line, the former N. W. corner, from which a b. jack 10 in. dia. bears 35 S. 33½ W. 148 lks., and a p. oak 12 inches dia. bears S. 26 E. 310 lks.; thence S. 60½ E. 76.00 chs., put a stone in place of his old N. E. corner; thence S. 29 W. 12 ch. 70 lks. Clamorgan's corner, and with the line of the field-lands 29.00 ch. a branch 12 lks. bears E. 57 ch. 20 lks., the beginning corner-stone. Nov'r, 1817.

JOS. C. BROWN, *D. S.*

OFFICE OF THE RECORDER OF LAND-TITLES,
St. Louis, August 26, 1873.

This is to certify that the above is a correct and true copy from page 195 of a book marked "Records B," of United States surveys; which book is up to this day preserved on file in this office.

STILLMAN O. FISH, *Recorder.*

On August 9th, 1873, a patent was issued to "Auguste Dodier or his legal representatives;" which patent recites in full the commissioners' certificate and the survey of Joseph C. Brown.

Said Auguste Dodier married Pelagie Reviere, alias Bacanné, in 1787, and he and his wife died before 1823, leaving as their sole heirs five children—Joseph, Charles, Cecile, Emilie, and Pelagie.

Emilie, as Widow Pacquette, conveyed all her interest in said survey 422 to Wharton R. McPherson in 1831, who conveyed the same to Joseph Charless in May, 1836.

Joseph Dodier conveyed his interest in said survey September 19th, 1823, to William & Wharton Rector. William Rector died, and the public administrator of St. Louis County administered on his estate. At the June term, (June 6th,) 1840, an order of sale was made by the probate court. Under this the interest of the deceased was sold to Joseph Charless.

On July 25th, 1840, a deed for said interest was made by said ad-
36 ministrator to said Charless, which is dated August 24th, 1840, acknowledged same day, and recorded September 21st, 1840. The sale was approved by the probate court at the September term, (September 9th,) 1840.

Wharton Rector died in 1842, leaving, now alive, four children as his sole heirs, of whom three are plaintiffs in this suit. Joseph Charless died years before the commencement of this suit, leaving two heirs only, who are both plaintiffs in this suit.

Charles Dodier conveyed his interest in said survey to W. R. McPherson on October 1st, 1831, and said McPherson conveyed to Pierre A. Labeaume May 7th, 1833. On November 20th, 1839, a judgment was rendered in the circuit court of St. Louis County against Pierre A. Labeaume, on which execution issued February 10th, 1840, in words and figures following, to wit:

Execution against Pierre A. Lebeaume.

COUNTY OF ST. LOUIS, *set.:*

The State of Missouri to the sheriff of the county of St. Louis, greeting:

Whereas Theophilus B. Hyde, on the 20th day of November, 1839, at

our circuit court, before our judge thereof, recovered against Pierre A. Labeaume the sum of four hundred and eighty-eight dollars and thirty-four cents for his debt, and also the sum of eighty-two dollars thirteen cents for his damages by him sustained by reason of the detention thereof, together with his costs and charges by him about his suit in that behalf expended, which to the said Theophilus R. Hyde were adjudged, as appears to us of record:

These are therefore to command you that of the goods and chattels, lands and tenements, of the said Pierre A. Labeaume in your bailiwick you cause to be made the aforesaid debt, damages, and costs; that you have the same before the judge of our said court on the third Monday of March next, to render to the said Theophilus R. Hyde the
37 debt, damages, and costs aforesaid; and for want of sufficient goods and chattels, lands and tenements, whereon to levy and make the same, we command you to take the said Pierre Labeaume, if he be found in your bailiwick, and him safely keep so that you have his body before the same judge on the said third Monday of March to satisfy the said Theophilus R. Hyde of the aforesaid debt, damages, and costs, and that you certify to our said judge how you execute this writ; and have you then there this writ.

Witness John Ruland, clerk of our said court, at St. Louis, the tenth day of February, in the year of our Lord one thousand eight hundred and forty.

[SEAL.] JOHN RULAND, *Clerk C. C.*

The seizure of the lands on execution was made March 13th, 1840, and the sale was made April 4th, 1840, during the March term of the said circuit court, which commenced on the third Monday of March, (March 16th,) 1840.

Pelagie Dodier married Bazile Vasseur and died before her husband, leaving four children, two of whom died before their father, unmarried and without issue.

The plaintiff Pelagie Tatum is one of the two surviving children.

The claim under Pelagie of the other survivor and the claim under Cecile Dodier are not represented in this suit.

The court further found that the yearly value of the land in controversy is seven dollars per acre, and that the whole value of the land in suit is more than two thousand dollars.

The alias of Philip Rivière, whose survey bounded survey 422 on the the northwest, was Philip Bacanné.

38 The land claimed by plaintiffs in this action is part of the tract of six by 26 arpens described in the conveyance from Dodier and wife to Labeaume.

The said Louis Lebeaume died prior to the year 1821, leaving a will, dated November 22d, 1817, which was duly proved in the probate court of St. Louis County April 4th, 1821, whereby he devised all his real estate to his wife, Susan Labeaume; that by mesne conveyances all the title which Susan Lebaume had to the lands in controversy passed to the defendant Henry S. Carter.

The defendant Becker is the tenant of said Carter.

The said defendants and those under whom they claim have been in open, notorious, continuous, undisturbed, and adverse possession of the land in controversy, claiming title for more than thirty-five years next before the commencement of this suit.

Prior to and on December 20th, 1803, the land now known as U. S. survey No. 422 was cultivated and possessed by the said Auguste

Daudier, who was an inhabitant of the village of St. Louis, and had a right, title, and claim thereto.

Said land has the form of a parallelogram, and adjoins on its southeast line the series of common-field lots now known as the "Grand Prairie common-fields of St. Louis," and on its southwest line the common-field lot confirmed to John Watkins, (survey No. 1261). It is distant about six miles from the centre, on the river bank, of what was the village of St. Louis in the year 1800, and it lies outside of the out-boundary-line of St. Louis as run in 1840, under the provisions of the act of June 13th, 1812. In 1769, prior to the concession to Dodier, several lots, from 1½ to 3 arpens in width by 40 arpens in depth, in the form of
39 commom-field lots, had been conceded to other inhabitants of the village in continuation of other field-lots then owned by them in the said Grande Prairie common field, so as to cover more than two-thirds of said survey 422, taken from the southwestern part thereof, and also part of the survey beyond it; the southeast and southwest lines of said lots so conceded in 1769 being identical with the southeast and southwest lines of survey 422. Said concessions of 1769 are shown by red lines on Cozen's plat, as follows:

(Here insert A, herewith transmitted under separate certificate—map.)

40 the corners being marked B. W, X, Y, but said concessions have not been confirmed by the United States.

The lot of ground now known as survey 422 was an out-lot of the said village of St. Louis, with definite boundaries and location, prior to and at the date of the acquisition of Louisiana by the United States.

The court further finds that the following map, B, is a correct representation of the location of the survey by the United States in and around St. Louis, including survey 422:

(Here insert B, herewith transmitted under separate certificate—map.)

41 Louis Labeaume, in 1818, filed a petition for a partition of said survey 422, as appears by the following copy of the record of the case:

Petition of Louis Lebeaume for partition.

To Pelagie Bacané, widow of Augte. Dodier, to Gabriel, Joseph, Charles, Cecille, Emilie, and Pelagie Dodier, and other, the heirs and lawful representatives of Augte. Dodier, deceased:

Take notice that on the second Monday of the month of June next I shall apply to the circuit court, holden in the town of St. Louis, for and in the county of St. Louis, in order to obtain a lawful and equitable partition of the land belong' to the estate of Augte. Dodier, deceased, and have that part of the land I purchased from him ascertained and bounded according the true intent and meaning of the deed given to me by Augte. Dodier and Pelagie Bacané, his wife, when and where you may attend if you think proper.

Given under my hand this 21st of the month of March, in the year 1818.

L. LABEAUME.

COUNTY OF ST. LOUIS,
Missouri Territory:

Before me, one of the justices of the peace for and in the county of St. Louis, personally appeared P. Augt. Labeaume, who, being duly sworn according to law, has declared and said that on the 21st day of the month of March, in the present year, he, deponent, had served the above notice upon Pelagie Bacané, widow of Augte. Dodier, and the other above named *the* heirs and lawful representatives of Augte. Dodier, deceased, by reading the same unto them in *to* English and French language.

In testimony whereof he, deponent, has hereto subscribed his name this twentyeth of the month of April, in the year 1818.

P. AGST. LABEAUME.

42 Sworn to and subscribed before me, justice of the peace afores'd.
F. M. GUYOL, *J. P.*

To the honorable the circuit court in and for the county of St. Louis, in the Territory of Missouri:

The petition of Louis Labeaume, of the county of St. Louis, most respectfully sheweth, that on the fifth day of January, in the year one thousand eight hundred, there was granted and conceded to one Auguste Dodier, by the then lieutenant-governor, Charles Dehault Delassus, of the late province of Upper Louisiana, a concession for the quantity of nineteen arpents of land in front by twenty-six arpens in depth, situated about six miles northwest of the town of St. Louis, which said land was duly surveyed; that on the eighteenth day of January, in the year eighteen hundred and five, the said Auguste Dodier & Pelagie Baccané, his wife, by a proper deed of transfer, duly executed and recorded, and now shown to this honorable court, sold, transferred, and conveyed in fee-simple to your petitioner the undivided quantity of one hundred and fifty-six arpens of said tract of land—that is to say, the quantity of six arpens in front by twenty six depth—to be taken from the most eastern part of said tract, provided that in that quantity there should be found one-half part of said sold & transfered tract of land, to wit, three arpens in front by the usual depth, in the woodland bounded by Philip Baccané in the northwest, and in the southwest by the remaining part of said concession above mentioned, as granted to said Auguste Dodier, as will more fully appear, reference being had to said deed. And your petitioner further states that the said Auguste Dodier died in ,
43 leaving Pelagie, his widow, Gabriel, Joseph, Cecile, Emilie, and Pelagie, children of said deceased, as his proper heirs and representatives. And he further represents that no division or partition of said tract of land has ever taken place in any manner, either between said Auguste Dodier, deceased, or his wife, nor the aforesaid heirs and representatives and your petitioners. Therefore he prays that commissioners may be appointed by this court and a partition and division had of the aforesaid tract of land according to the true intent, meaning, and effect of the statute of this Territory for the partition of lands; and he, &c.

L. LABEAUME.

THURSDAY, 18*th June*, 1818.

LOUIS LABEAUME
vs.
AUGUSTE DODIER'S HEIRS. } Petition for partition of land.

And now at this day come the said Louis Labeaume, by Mr. Hemptead, his attorney, and presents his petition to the said court, praying for a partition of the tract of land in said petition mentioned; and it appearing to the court that a notice has been given to the parties concerned, the court thereupon appoint Stephen Hempstead, sr., Joseph Hebert, Hyacinthe St. Cir, and Joseph Brazeau, junr., as commissioners, to proceed to make partition of said lands according to the prayer of said petitioner, and make a return of their proceedings to the next term of this court.

SATURDAY, *October* 24*th*, 1818.

LOUIS LABEAUME
vs.
AUGUSTE DODIER'S HEIRS. }

Now at this day Joseph Hebert, Hyacinthe St. Cyr, and Stephen Hempstead, senr., three of the commissioners appointed by this court at the last term to make partition of certain lands between the parties aforesaid, appear here in court in their own proper persons, and file their report and proceedings therein in the words and figures following, to wit:

44 Pursuant to an order of the circuit court for the county of St. Louis, June term, 1818, we, the commissioners appointed by said court to execute a partition of land between Louis Labeaume and the heirs of Auguste Dodier, deceased, having taken the oath prescribed by law, and having fully and carefully viewed the premises to be divided, after a mature deliberation, in order to do justice to the parties concerned and avoid damages to any of them, have agreed and decided that the partition of said tract of land ought to be made as it is hereafter stated.

Beginning at a stake in the northeast corner of Gen'l Wm. Clark's survey and running north twenty-two degrees east thirty-one chains thirty-nine links to a stake, from which a white oak thirty-six inches bears south twenty-eight west one hundred and twenty-three links, and a do. thirty bears south seventy-four east one hundred and eight links; thence north sixty-eight west forty-two chains to a stake, from which a black oak six inches diameter bears north sixty-three west seventy-nine links, & a hickory five inches south twenty-two east nin'ty links; thence south twenty-two east thirty-one chains thirty-nine links to a black oak on Clark's line; thence with said line to the beginning, so as to include one hundred and thirty-two and seventy-hundredths of an acre, or one hundred and fifty-six arpens of land, to be the share and portion and remain the property of said Louis Labeaume, it being the most equitable way of complying with the deed given to said Louis Labeaume by Auguste Dodier, deceased, and Pelagie Bacanne, his wife; the balance of the land to be the share and portion and to remain the property of the heirs of said Auguste Dodier, which tract of land, as it is here above bounded, has been surveyed and plotted accordingly, and to which division some of the parties concerned, being present, have given their agreement and consent.

In testimony whereof we have hereto set our hands and seals this first of the month of October, in the year eighteen hundred and
45 eighteen.

Which said report is under their hands and seals, and, being by them acknowledged, is by the court here approved.

STATE OF MISSOURI,
County of St. Louis, ss:

I, John Lewis, clerk of the circuit court within and for the county and State aforesaid, certify the foregoing to be a full, true, and complete transcript of the record and proceedings in the case of Louis Labeaume vs. Auguste Dodier's Heirs, as fully as the same remains of record & on file in my office.

Witness my hand and the seal of said court hereto affixed, at office in the city of St. Louis, this 15th day of September, A. D. 1873.

{ SEAL ST. LOUIS } JNO. LEWIS,
{ CR. COURT. } *Clerk.*

The land described in the plaintiffs' petition in this suit in ejectment is not within the boundaries of the tract described in the report of the commissioners in said partition suit to be set off to Labeaume.

In the year 1822 Susan Labeaume brought an action of trespass quare clausum fregit against Dodier's heirs, in the circuit court of St. Louis County, to which was pleaded the general issue and liberum tenementum; whereupon the plaintiff replied to second plea by novel assignment, (describing the close as in the report of commissioners in the above partition suit.) On July 27th, 1825, the defendants in said suit obtained a verdict and judgment thereon, and the case was taken by writ of error to the supreme court of the State of Missouri, by which, on May 25th, 1826, the judgment was reversed and the case remanded, and on May 8th, 1827, defendants again obtained judgment in the said circuit court. From the record of the said supreme court in said
46 cause it appears that a transcript of the record of said partition suit of Louis Labeaume vs. Dodiers' Heirs, was read in evidence, but that the notice to defendants in said partition suit was not included in the bill of exceptions and was not before the supreme court, and that the conveyance from Auguste Dodier and wife to Louis Labeaume, being admitted by defendants in said trespass suit, was also read upon the trial of said cause, and a copy thereof preserved in the bill of exceptions taken and filed in said cause.

Cecile Dodier, with her husband, Louis Vasseur, on December 10th, 1828, conveyed by deed to John O'Fallon a tract of 54 arpens, in survey 422, which in said deed is described as bounded east by a tract of land the property of the estate of Louis Labeaume, by him acquired of the above-named August Dodier, south by land heretofore owned by Abraham Gallatin, west by land the property of Francis Pacquet, and north by land the property of Bazile Vasseur; and that by mesne conveyances the title to said 54 arpens passed from John O'Fallon to Joseph Charles, (under whom plaintiffs Le Bourgeois and Mrs. Charless claim,) who by the same description conveyed the same, on August 4th, 1835, to Edward Tracy in trust for Catharine Collett, and that by mesne conveyances said title passed from said Tracy and Collett to Henry M. Shreve, who devised a portion thereof to the defendant Carter.

That by deed of mortgage dated June 5th, 1840, Joseph Charless and Charlotte T. Charless, his wife, conveyed to one Thomas J. Ferguson

a tract of land of about 298 arpens, described as bounded on the north by lands of H. M. Shreve and Robert and Alex. Moore, on the east by land of Col. John O'Fallon, on the south by land of Henry Clay
47 and M. Lewis Clark, and west by lands of Benjamin Ames Piron and Madame Elder.

None of the deeds last above mentioned as conveying the tract of 54 arpens described in the deed of Cecile Dodier and husband to John O'Fallon, nor the mortgage to Ferguson, covered any part of the land in controversy.

None of the defendants, nor any person under whom they claim, was party or privy to any of said deeds.

Upon the foregoing special finding of facts the court declares the law to be that the plaintiffs are not entitled to recover, and orders judgment to be entered for the defendants.

To which declaration of law for the defendants on said special finding of facts the plaintiffs then and there excepted.

Whereupon plffs. filed their motion for a new trial, as follows:

Motion for new trial.

PATRICK RYAN ET AL.
vs.
HENRY S. CARTER ET AL.

In the United States circuit court for the eastern district of Missouri.
March t. 1874.

And now come the plffs. and file their motion to set aside the judgment of the court in said case rendered, and to grant the plaintiffs a new trial for the following reasons:

1st. Because the court admitted illegal and incompetent evidence offered by the defts. against objections of plff's.

2d. Because the court made erroneous rulings & decisions in the law of the case.

3d. Because the court found as a fact what is a matter of law.

4th. Because the court found facts based upon illegal evidence
48 admitted against objections of plffs.

5th. Because, upon the evidence in the case, the court should have given judgment for plaintiffs and not for defts.

D. T. JEWETT,
Atty. for Plffs.

Which motion the court overruled; to which action of the court in rendering judgment for defts. & overruling said motion for a new trial the plffs. at the time excepted.

Wherefore plaintiffs pray that all the aforesaid evidence, papers, rulings, motions, & other proceedings may be made a part of the record; which is accordingly done.

SAMUEL TREAT.
Judge Presiding at Trial.

And afterwards, in vacation of said circuit court, the following further

proceedings were had in this cause on Friday the 3d day of July, A. D. 1874, to wit:

MARY RYAN ET AL., PLAINTIFFS,
vs.
HENRY S. CARTER ET AL., DEFENDANTS. } Petition.

The writ of error, citation, and bond of appeal herein having been presented to the honorable Samuel Treat, one of the judges of this court, the said writ of error is allowed by said judge, the citation signed, and the bond approved and ordered to be filed and made a part of the record in this case.

The bond filed as aforesaid is in the words and figures following, to wit:

Bond.

49 Know all men by these presents, that we, George C. Miller, as principal, and John A. McKinney and Alfred Bevis, as sureties, are held and firmly bound unto Henry S. Carter and Jacob Becker in the full and just sum of five hundred dollars, to be paid to the said Henry S. Carter and Jacob Becker, their heirs, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals and dated this second day of July, in the year of our Lord one thousand eight hundred and seventy-four.

Whereas lately, at the March term, A. D. 1874, of the circuit court of the United States for the eastern district of Missouri, in a suit depending in said court between Mary Ryan, Louis S. Le Bourgeoise, Elizabeth C. Le Bourgeoise, Charlotte T. Charless, William Walker, Mary Walker, Frank A. Rector, Thomas H. Rector, William Tatum, and Pelagie Tatum, plaintiffs, and Henry S. Carter and Jacob Becker, defendants, judgment was rendered against the said plaintiffs, and the said plaintiffs having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Henry S. Carter and Jacob Becker, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said plaintiffs shall prosecute said writ to effect, and answer all damages and costs if they fail to make good their plea, then the above obligation to be void; else to remain in full force and virtue.

50 GEO. C. MILLER. [SEAL.]
JOHN A. McKINNEY, [SEAL.]
ALFRED BEVIS. [SEAL.]

Sealed and delivered in presence of—

Approved by—

SAMUEL TREAT, *Judge.*

51 UNITED STATES OF AMERICA,
Circuit Court for the Eastern District of Missouri, ss:

I, Austin Drake, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto annexed to be a transcript of the record and proceedings in the case of

Mary Ryan et al. against Henry S. Carter et. al., as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name, and affix the seal of said court, at office in the city of St. Louis, in said district, this twenty-ninth day of June, in the year of our Lord eighteen hundred and seventy-four.

[SEAL.]

AUSTIN DRAKE, *Clerk.*
By H. C. GEISBERG, *Deputy.*

(Indorsed:) United States circuit court, eastern district of Missouri. Mary Ryan et al. against Henry S. Carter et al. Duly certified transcript of the record and proceedings in the above-entitled cause.

(Indorsement on cover:) No. 246. Mary Ryan, L. S. Le Bourgeoise, E. C. Le Bourgeoise, Charlotte T. Charless, Wm. Walker, Mary Walker, F. A. Rector, Thos. H. Rector, Wm. Tatum, & P. Tatum, plffs. in error, vs. Henry S. Carter & Jacob Becker. E. Missouri, C. C. U. S. Filed 11th September, 1874.

CHANCY R. BARNS, PRINTER, 215 PINE STREET.

IN THE

SUPREME COURT

OF THE UNITED STATES,

October Term, 1875.—No. 246.

ERROR FROM THE UNITED STATES CIRCUIT COURT FOR THE EASTERN DISTRICT OF MISSOURI.

MARY RYAN, *et al.*

Plaintiff in Error and Plaintiffs Below,

vs.

HENRY S. CARTER, *et al.*, *Defendants in Error.*

Brief for Plaintiffs in Error.

D. T. JEWETT,

Att'y for Plaintiffs.

IN THE

SUPREME COURT

OF THE UNITED STATES,

October Term, 1875.—No. 246.

ERROR FROM THE UNITED STATES CIRCUIT COURT FOR THE EASTERN DISTRICT OF MISSOURI.

MARY RYAN, *et al.*

Plaintiff in Error and Plaintiffs Below,

vs.

HENRY S. CARTER, *et al.*, *Defendants in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

This is an action of ejectment brought by the plaintiffs in error, as plaintiffs below, in the United States Circuit Court for the Eastern District of Missouri, for the possession of about twenty-two acres of land, a part of United States survey No. 422, in St. Louis County, about six miles northwest from the court house in St. Louis. A jury was waived and the court made a special finding of the facts as set out in the record, pages 15 to 29. A bill of exceptions was also taken to the admission of evidence and rulings of the Court. Record, pp. 8 to 15. An abstract of the case is submitted as follows:

On the 13th of October, 1800, August Dodier asked of Charles Dehault Delassus, Spanish Lieutenant Governor of

Upper Louisiana, at St. Louis, a concession of 500 arpents of land (425 acres), saying he was an old resident of the Territory; that the cultivation of land in common was abandoned; that it became every day more difficult to procure wood and to cultivate land; that his family consisted of himself, wife and six children, and he asked a grant of the quantity of land "*corresponding to his family, according to the regulation*," about four or five miles west of the town (St. Louis), at the end of the land of the second concession.

On the 14th of October, 1800, Delassus ordered that Dodier should be put in possession of the land requested, by Ant. Soulard, the surveyor, of *a quantity corresponding to the number of his family, according to the regulations* of the Governor General of the Province, the title to be solicited of the Intendant General of the Province.

On the 10th of December, 1800, the said Soulard surveyed said land (500 arpents) for said Dodier, and described it as situated "about six miles at the northwest of this town, bounded on the north, northeast, and east, southeast by *uncultivated lands of the royal domain*—on the west northwest, by land of Phillippe Riviere, and on the south southwest by the land of John Watkins." The survey is a parallelogram, and its side lines run south 68, east and south 22 west. A plat of this survey was duly recorded, and with the petition and concession is a part of the record in this case. Vide Rec. p. 17.

Said Dodier duly filed and presented his claim to the Board of Commissioners, under the act of Congress of March 2, 1805, chapter 26, 2 Vol. U. S. Statutes, p. 324—for adjusting land titles in the Territory of Orleans and District of Louisiana.

Thereupon the Board, on the 17th of February, 1806, took proof of settlement and cultivation before December, 1803, and confirmed the claim to "August Dodier," under the second section of the said act, as per his concession.

Again, on the 31st of July, 1810, the Board took up the

claim, and again grant to "August Dodier" 500 arpents of land, "as described in a plat of survey certified December 10, 1800.

A second confirmation of the same claim by the commissioners, was common after the amendatory act of 1807, which made their decisions final.

On the same day (July 31, 1810) the Board issued their certificate, No. 422, to the effect that they had found August Dodier entitled to a patent, under the second section of the act of March 5, 1805, to 500 arpents of land, as described in a plat of survey certified December 10, 1800.

The proceedings of the Board are on pages 20, 21 and 22 of the printed record in this case.

The land so confirmed was surveyed in 1817 by the United States Surveyor, Jos. C. Brown, and approved in 1822. It was surveyed as 500 arpents, equal to 425 35-100 acres, and is United States survey No. 422, in St. Louis County. The United States surveyor commences his survey "at the end of the common field."

The patent reciting the confirmation and survey was not issued till August 9, 1873. The survey is on pages 22–3 of the Record, but the patent is not copied, but the fact of the patent is found by the court on p. 23 of Record.

August Dodier was married in 1787, and he and his wife died before 1823, leaving as heirs five children, viz.: Joseph, Charles, Cecile, Emily and Pelagie.

The plaintiffs in this case claim the shares of Joseph, Charles, Emily, and about half of that of Pelagie. Cecile's and the other half of Pelagie's is not represented in this suit.

The plaintiff put in evidence the petition of Dodier, the concession or order of survey, the survey of Soulard, the proceedings of the commissioners, the United States survey, and the patent, and the chain of title from the heirs of Dodier, as above named, and the value of the premises and rested.

The defendants made some technical objections to two

judicial sales in plaintiff's chain of title, and the Court made some special findings as to those papers, that are not probably material in the case before this Court—as the findings of the Court in favor of the defendant were on matters set up by defendants in their defense.

The defendants claim title under the widow and sole devisee of Louis Labeaume, who died prior to April, 1821, when his will was probated in St. Louis county, and their chain of conveyances from said widow is not contested.

The defendants first offered in evidence what they claimed was a copy of a deed of August Dodier and wife, dated January 18, 1805, acknowledged May 10, 1816, and recorded in St. Louis county, June 5, 1816. This copy did not purport to be a copy of a sealed instrument, and the Court has found as a fact that the instrument was never sealed, and that the original is lost. Vide Record, pp. 19 and 20 for the copy of the deed, and p. 20 for the finding of the Court on this point.

The bill of exceptions shows (Record, p. 9,) that the introduction of the said copy was objected to by plaintiff:

First—Because the deed was made and executed before the passage of the Act of Congress of March 2, 1805, and was never filed with the Recorder of Lands or laid before the Board of Commissioners created by that Act, and could not, therefore, be used as evidence against any one claiming under Dodier, after a confirmation of the land to him in 1806 and 1810.

Second—That the grantors did not affix any seal to it, and it was not a deed under the common law, and was of no force or effect as a deed or conveyance in May or June, 1816, when acknowledged and recorded.

Third—That, under the statutes of Missouri, it was not entitled to be acknowledged or recorded as a deed or conveyance in May or June, 1816, and, therefore, a copy of the records was not admissible as evidence.

These objections were overruled by the Court, and the copy admitted. This alleged deed purports to convey to

Louis Labeaume a strip of 6 by 26 arpents of this survey, and the Court found that the description covered the land sued for, on the northeast side of the survey.

The defendants then offered evidence to prove that survey No. 422 was a "common field lot or out lot" within the meaning of the Act of Congress of June 13, 1812, U. S. Stat., Vol. 2, p. 748,) confirming such "common field lots or out lots" to the inhabitants of the towns and villages of Missouri, when inhabited or cultivated by them before December 20, 1803, and that said August Dodier did so inhabit and cultivate said tract of land.

To the introduction of this evidence the plaintiff objected. 1st. Because the said survey, No. 422, was confirmed to said Dodier by the Board of Commissioners under the Act of Congress of March 2, 1805, and Acts of April 21st, 1806, and March 3, 1807, supplementary thereto, and that upon land so confirmed the Act of June 13, 1812, was wholly inoperative, and that such testimony was irrelevant and incompetent. And 2d, that said survey was not a "common field lot or out lot." But the Court overruled the objection and admitted the evidence.

The defendants then read depositions of Joseph Hortiz and Henry Michel, to prove inhabitation and cultivation of said land by Dodier before December, 1803. To prove that it was a common field lot or out lot, defendant also offered and read copies from Livre Terrien, of certain concessions of certain lots from 1½ to 3 arpents in width by 40 arpents long—made by St. Ange, a French officer, in 1769, to Laclede Liguest; and then called William H. Cozens, a surveyor, as a witness, who testified that he had surveyed at different times all that region of country, and from his surveys had protracted the plat exhibited to the Court, and made part of the record, (page 25, map A,) and that said concessions, if protracted on the face of the earth, would cover two-thirds of said survey on the southwestern part thereof.

This evidence was objected to by plaintiff; that said con-

judicial sales in plaintiff's chain of title, and the Court made some special findings as to those papers, that are not probably material in the case before this Court—as the findings of the Court in favor of the defendant were on matters set up by defendants in their defense.

The defendants claim title under the widow and sole devisee of Louis Labeaume, who died prior to April, 1821, when his will was probated in St. Louis county, and their chain of conveyances from said widow is not contested.

The defendants first offered in evidence what they claimed was a copy of a deed of August Dodier and wife, dated January 18, 1805, acknowledged May 10, 1816, and recorded in St. Louis county, June 5, 1816. This copy did not purport to be a copy of a sealed instrument, and the Court has found as a fact that the instrument was never sealed, and that the original is lost. Vide Record, pp. 19 and 20 for the copy of the deed, and p. 20 for the finding of the Court on this point.

The bill of exceptions shows (Record, p. 9,) that the introduction of the said copy was objected to by plaintiff:

First—Because the deed was made and executed before the passage of the Act of Congress of March 2, 1805, and was never filed with the Recorder of Lands or laid before the Board of Commissioners created by that Act, and could not, therefore, be used as evidence against any one claiming under Dodier, after a confirmation of the land to him in 1806 and 1810.

Second—That the grantors did not affix any seal to it, and it was not a deed under the common law, and was of no force or effect as a deed or conveyance in May or June, 1816, when acknowledged and recorded.

Third—That, under the statutes of Missouri, it was not entitled to be acknowledged or recorded as a deed or conveyance in May or June, 1816, and, therefore, a copy of the records was not admissible as evidence.

These objections were overruled by the Court, and the copy admitted. This alleged deed purports to convey to

Louis Labeaume a strip of 6 by 26 arpents of this survey, and the Court found that the description covered the land sued for, on the northeast side of the survey.

The defendants then offered evidence to prove that survey No. 422 was a "common field lot or out lot" within the meaning of the Act of Congress of June 13, 1812, U. S. Stat., Vol. 2, p. 748,) confirming such "common field lots or out lots" to the inhabitants of the towns and villages of Missouri, when inhabited or cultivated by them before December 20, 1803, and that said August Dodier did so inhabit and cultivate said tract of land.

To the introduction of this evidence the plaintiff objected. 1st. Because the said survey, No. 422, was confirmed to said Dodier by the Board of Commissioners under the Act of Congress of March 2, 1805, and Acts of April 21st, 1806, and March 3, 1807, supplementary thereto, and that upon land so confirmed the Act of June 13, 1812, was wholly inoperative, and that such testimony was irrelevant and incompetent. And 2d, that said survey was not a "common field lot or out lot." But the Court overruled the objection and admitted the evidence.

The defendants then read depositions of Joseph Hortiz and Henry Michel, to prove inhabitation and cultivation of said land by Dodier before December, 1803. To prove that it was a common field lot or out lot, defendant also offered and read copies from Livre Terrien, of certain concessions of certain lots from 1½ to 3 arpents in width by 40 arpents long—made by St. Ange, a French officer, in 1769, to Laclede Liguest; and then called William H. Cozens, a surveyor, as a witness, who testified that he had surveyed at different times all that region of country, and from his surveys had protracted the plat exhibited to the Court, and made part of the record, (page 25, map A,) and that said concessions, if protracted on the face of the earth, would cover two-thirds of said survey on the southwestern part thereof.

This evidence was objected to by plaintiff; that said con-

cessions were never recognized or surveyed by the Spanish Government or by the United States; that Cozens' evidence was mere opinion of a private individual—and that all was incompetent. But the objections were overruled and the evidence admitted. The Court found (Record, p. 25,) that survey 422 was an "out lot" within the meaning of the Act of June 13, 1812, and that it was cultivated and possessed before December 20, 1803, by August Dodier, an inhabitant of the village of St. Louis.

The Court also found that said survey was outside of the "out boundary line" as run by the United States, under the provisions of the said Act of 1812, and that said "concessions" from Livre Terrien never were surveyed or recognized by the United States.

The court also found (p. 25) that map B, referred to, is a correct representation of the surveys in and around St. Louis, including survey 422.

The defendants also offered a certain copy of a deed by Cecile Dodier (whose interest in said survey is not claimed in this suit) to O'Fallon, and a deed by him to Charless, under whom two of the plaintiffs claim another heirs interest, and Charless to others, containing certain recitals set out in the record, for the purpose of estopping plaintiffs from denying Labeaume's title—but the court found that none of the deeds related to the land in controversy, and that neither the defendants, nor those under whom they claimed, were parties to said deeds.

In reply the plaintiffs put in evidence a copy of a record of a partition suit brought by said Labeaume in 1818 (after the death of August Dodier), against the widow and children of said Dodier, in which suit the said Labeaume set out his alleged deed of January 18, 1805, and averred that by virtue of said deed he was an owner in common and undivided with the said widow and children of the said tract of 500 arpents. Notice of the pendency of the said suit in partition was proved to have been given to said widow and heirs, by an affidavit, but no appearance of said defendants

in said suit was ever made by themselves or attorney, and judgment by default was taken. Commissioners to make partition were appointed by the Court, partition made, the report of said commissioners duly returned to the Court, containing a particular description of the land set off to Labeaume for his interest as claimed by him—and said report was approved by the Court. The record of said suit is found on pages 25 to 28, of the Record.

The Court found as a fact (Record, p. 28), that the land so set off to Labeaume in said partition, was *no part of the land* sued for in this suit. The record in this case shows that the land set off to Labeaume by the commissioners is in the *southeast part of the survey*, and does not extend far enough northeast to reach the land in controversy.

This partition suit by Labeaume was prosecuted under the provisions of the Territorial Act of Missouri, passed November 2, 1808, which will be hereinafter referred to and quoted.

It also appears in the finding of the Court (Record, p. 28), that in 1822, after the death of Labeaume, his widow and sole legatee, brought an action of trespass against some of the heirs of Dodier, for cutting wood on the tract set off to Labeaume in the partition suit—that plaintiff was beaten, and appealed to the Supreme Court of Missouri, and the judgment was reversed, and on another trial plaintiff was again beaten and that was the last that is known about it.

Upon evidence introduced by defendants, the Court found that the defendants and those under whom they claimed, had been in adverse possession, claiming title, for about thirty years.

Upon all the evidence the Court gave judgment for the defendants.

From the amount of evidence admitted, and the numerous facts found by the Court, it is difficult, if not impossible, to tell upon what evidence and facts the judge who made the finding based his judgment for the defendants, as he does not lay down *any proposition of law* upon which his judgment rests. It would seem that his judgment *must* have been founded upon one or more of the three following grounds:

First—As the Court admitted in evidence the copy of the alleged deed of Dodier to Labeaume, dated January 18, 1805, and acknowledged May 10, 1816, and recorded June 5, 1816, the Court may have held that it was a valid deed, notwithstanding the confirmation of the whole tract to "August Dodier," in 1810 (not naming his legal representatives), and that said confirmation and patent enured to the benefit of Labeaume and those claiming under him.

In order to find for the defendants on this ground, the Court must also have held as law, that the judgment in the partition suit of Labeaume vs. Dodier's widow and children, did not bind Labeaume and those claiming under him, as to the location of the land, and that the Court was at liberty to locate the Labeaume claim where it thought the said alleged deed called for the land, disregarding Labeaume's allegations that he was an owner in common as well as the proceedings in partition. This must be, because the Court has found as facts, that the land in suit is *not* within the bounds of the lands set off to Labeaume in said partition suit, but *is* within the bounds of the land called for by said alleged deed.

Second—As the court found as facts that survey 422 was an "out lot" in and adjoining the village of St. Louis, in 1812, within the meaning of the Act of June 13, 1812, and that Dodier cultivated and occupied it before December 20, 1803, the Court may have found, as a matter of law, that the said Act of June 13, 1812, took the fee of said land out of the United States in 1812 and vested it in said Dodier, and that therefore at any time after 1812, adverse

possession would operate to divest title out of Dodier or those under him, notwithstanding the claim of Dodier to the land had been confirmed by the Commissioners in 1810 to Dodier, as before stated, and notwithstanding the proviso in the Act of June 13, 1812 as to claims so confirmed.

Third—As the land was confirmed to Dodier, in 1810, by the Old Board of Commissioners, under the Acts before referred to of 1805-6 and 7, and as the defendants had undoubtedly been in possession of the land sued for, more than ten years before the commencement of this suit, (the time required by the Statutes of Limitations of Missouri,) the Court may have held that the defendants had acquired title by *adverse possession*, *notwithstanding* the fact that no patent to the land was ever issued by the United States authorities till a few months before the commencement of this suit.

As I have therefore no means of knowing what the Court did hold the law to be, except so far as it is indicated by the admission of evidence, I will endeavor to show that the Court erred in the admission of the evidence objected to by the plaintiffs.

That the Court erred in the finding of facts upon the evidence admitted, especially in finding that survey 422 was an "out lot" of the village of St. Louis in 1812, and finally—

That upon all the facts found, the law does not justify the judgment of the Court for the defendants.

The first piece of evidence offered by the defendants, was a copy from the Records of Deeds of St. Louis County, of a paper purporting to have been made January 18, 1805, by August Dodier and wife, conveying to Louis Labeaume, 6x26 arpents of the concession or order of survey of 500 arpents, made to said Dodier by said Delassus in 1800. This paper, called by the Court a deed, purported to have been acknowledged by Dodier and wife, in St. Louis County, May 10, 1816, and recorded June 5, 1816. It was

signed in the presense of witnesses, but has no testimonium, and does not purport ever to have had a seal, and the Court found it had none.

The plaintiffs objected to this deed, that it was made and delivered in January 1805, before the passage of the Act of Congress of March 2, 1805, entitled "An Act for "ascertaining and adjusting titles and claims to lands in the "Territory of Orleans and District of Louisiana." U. S. Statutes, vol. 2, page 324, and the Acts supplementary thereto. That said deed was never recorded by the Recorder or Register of the Land Office, as required by said Acts, and that the claim under it was never laid before the Board of Commissioners created by said Act of 1805, and that the *whole* concession of 500 arpents was confirmed to "August Dodier" by said Board in 1810, under the provisions of said Act of March 2, 1805, and the supplementary Acts of April 21, 1806 and March 3, 1807.

In consequence of the above facts, I say that the title to the whole concession of 500 arpents was vested in, or granted to, August Dodier in 1810, and that Labeaume, and all claiming under him, were forever barred from setting up title under said alleged deed or conveyance.

This claim is confirmed under the *first* clause of the second Section of the said Act of March 2, 1805, for "settlement and cultivation" before December 20, 1803, by August Dodier as the head of a family" by "permission of the proper Spanish officer." It does not come under the second clause in said second Section as a "Spanish or French grant made and completed *before* the first day of October, 1800," and during the time that the government which made such grant had the actual possession of said territories. This "permission to settle" was made October 14, 1800, and was without authority, as Delassus was a Spanish officer, and the territories of Orleans and Louisiana were transferred from Spain to France on the *first* day of October, 1800, Therefore in January, 1805, when Dodier made his deed to Labeaume, he had no *equitable* interest

even which the United States were in honor bound to recognize, and what he got under the Act of March 2, 1805, was simply a donation from the United States.

The fourth Section of said Act of March 2, 1805, says, "every person claiming lands in said territories (Orleans "and Louisiana) by virtue of the two first Sections of this "Act, or by virtue of any grant or incomplete title, bearing "date subsequent to the 1st day of October, 1800, shall be-"fore the first day of March, 1806, deliver to the Register "of the land office, or Recorder of land titles, within whose "district the land may be, a notice in writing, stating the "nature and extent of his claims, together with a plat of "the tract or tracts claimed; and shall, also, on or before "that day, deliver to the said Register or Recorder, for the "purpose of being recorded, every grant, order of survey "deed, conveyance, or other written evidence of his claim; "and the same shall be recorded by the Register or Recor-"der, or translator hereinafter mentioned, in books to be "kept for that purpose." "And if such person shall neg-"lect to deliver such notice in writing of his claim, together "with a plat, as aforesaid, or cause to be recorded such "written evidence of the same, all his right, so far as the "same is derived from the two first sections of this Act, "shall become void, and forever thereafter be barred; nor "shall any incomplete grant, warrant, or order of survey, "deed of conveyance, or other written evidence, which "shall not be recorded as above directed, ever after be con-"sidered or admitted as evidence in any Court of the Uni-"ted States, against any grant derived from the United "States."

The time for filing and recording such papers was extended by the said supplementary Acts of Congress, to the first day of July, 1808, and was never again extended for the filing and recording of any papers that were to be laid before the Board created by the said Act of March 2, 1805. The fifth Section of the said Act of March 3, 1807, after extending the time of filing to July 1, 1808, says: "but the

"rights of such persons as shall neglect so doing within the "time limited by this Act, shall, so far as they are derived "from, or founded on any Act of Congress, ever after be "barred and become void, and the evidence of their claims "never after admitted as evidence in any Court of law or "equity whatever."

The fourth Section of the Act of 1807, provides that the said Commissioners shall have full power to decide upon the claims of persons to land, who were on the 20th of December, 1803, inhabitants of Louisiana, and for a tract not exceeding in quantity a league square, and that such "decision "of the Commissioners when in favor of the claimant, shall "be final against the United States, any Act of Congress to "the contrary notwithstanding."

The sixth Section of the Act provides for a transcript of decisions to be made to the Secretary of the Treasury, and the Surveyor General, and the delivery of a certificate to the party, reciting the circumstances and that he is entitled to a patent, and that is to be filed with Recorder or Register, who shall issue a certificate to be transmitted to the Secretary of the Treasury, which shall entitle the party to a patent.

It would seem that the provisions of the statutes are sufficiently explicit *to prevent the introduction of any such deed in evidence* (or to the claim of any title under it,) as the alleged deed of Dodier and wife to Labeaume which never was recorded or laid before the board.

But we are not left to the statute alone, for it has been repeatedly construed by the Courts to mean what plaintiffs claim it does. The whole matter was fully considered by this Court in the case.

Strother *vs.* Lucas, ~~U. S. R.~~, 6 Peters, U. S. pp. 771-2. And again, in same case, 12 Peters, pp. 453-4-5-6.

I understand the Court there to decide, clearly and emphatically, that the decision of the Commissioners, under the Acts of 1805-6 and 7, is *conclusive as to title in the person to whom it is confirmed*, and that any conveyances made *prior* to the filing of the claim before the Commissioners, are forever cut off, if not filed as required by the 4th section of the Act of 1805 and the 5th section of the Act of 1807, and laid before the Board. The Court also decides, in same cases, that a confirmation by the Board of Commissioners is a "grant" to the confirmee "derived from the United States," within the meaning of those Acts.

In Bissell *vs.* Penrose, 8 Howard Reports, 358, the point is considered as settled that a confirmation to the claimant, cuts off all all prior claims or conveyances.

In Landes vs. Perkins, 12 Mo., p. 255, these points are fully considered, and the Court held, that the confirmation to Clamorgan was conclusive against any one claiming under Clamorgan by Sheriff's deed, *after* the claim was filed, but *before* the confirmation by the Commissioners.

But in Landes *vs.* Brant, 10 Howard, p. 31, on the same facts, this Court so far modified the decision of Landes *vs.* Brant, as to hold that a conveyance made by Clamorgan *after* the filing of his petition for confirmation, would give the grantee the benefit of the confirmation. But the doctrine of Strother *vs.* Lucas was fully sustained and affirmed by the Court, and the benefit of the confirmation is strictly confined to those who claim by conveyances from confirmee, made *after the claim was filed before the Commissioners.*

In Guyol *vs.* Chouteau, 19 Mo., p. 546, the same point was again before the Supreme Court of Missouri. The case was this: In 1793 Antoine Roy and wife acquired title to a piece of land from Louis Boldue. The wife, (and mother of plaintiff,) died in 1803. Antoine Roy presented his claim for all the land, (the Spanish law only gave him half,) to the Commissioners, and it was all confirmed to

him in 1811. The defendants in the case claimed under Antoine Roy, the father; and the plaintiffs claimed as heirs of their mother. The Court, (Judge Gamble,) says: "If "the plaintiffs now have title, they had it *immediately* on "the death of their mother in 1803; and if so, it should "have been exhibited for confirmation as required by the "Acts under the penalty of being barred." The Supreme Court of the United States in Strother *vs.* Lucas, 12 Peters, held that the Acts of Congress are in the nature of the statute of limitations, and that the courts can make no exceptions to their operations. "If the claim was not pre- "sented, the party cannot claim the benefit of a confirma- "tion to another. If there were conflicting claims to the "lot in Antoine Roy and the plaintiff, according to a series "of decisions in the Supreme Court of the United States, "the confirmation to Roy must be held to pass the title to "him."

In Mitchele *vs.* Hanfield, 33 Mo. R., p. 439, the Court says: In this case the confirmation being of a definite tract of land, took immediate effect, and the subsequent proceedings by survey and patent relate to the time of the *inception* of the proceedings before the Board for Confirmation.

In Magwire *vs.* Tyler, 40 Mo., Reports, 434, the Court says: "The patents respectively relate back to the first "inceptive act in the series of concurrent acts, which are "necessary under the laws of the United States to complete "the conveyance. It has been decided, *and may be consid-* "*ered as settled*, that under the Acts of Congress on which "these titles depend the patent relates to the date of the "filing of the claim."

In the 4th Louisiana, An. Reports, p. 421, Turvis *vs.* Harmanson, the same doctrine is recognized as the law for that State, under the case of Strother *vs.* Lucas.

I know of no decisions in conflict with these, and it would seem to be settled beyond doubt, that no title to this land can be set up, unless it is under Dodier *after* he had filed his

claim before the Commissioners. This alleged conveyance to Labeaume, was before any law was passed by Congress for that purpose.

But defendants say this alleged deed was acknowledged in May, 1816, by Dodier and wife, and recorded June 5, 1816, and is, therefore, good. If such a conveyance as this purports to be was made by Dodier to Labeaume in January, 1805, it was doubtless good at that time under the Spanish law, to convey any interest Dodier had then in the land, for that law does not require a testimonium or seal. But by the decision before referred to, whatever rights it conferred by the Spanish law, were lost by failure to present them before the Commissioners.

I next consider the question whether or not it was made effective, or became a new deed and valid by acknowledgment and record in 1816. By the Territorial laws of the District of Louisiana, Vol. 1, p. 48, Sec. 8, it was enacted October 1, 1804, as follows: "All *deeds and conveyances*, "which shall be made and executed within this District, of "or concerning any lands, tenements or hereditaments "therein, or whereby the same may be any way effected, in "law or equity, shall be acknowledged by one of the grant-"ors or bargainers, *or proved* by one or more of the sub-"scribing witnesses to *such deed*, before one of the Judges "of the General Court, or before one of the Justices of the "Court of Common Pleas of the District where the land "conveyed lies, and shall be recorded in the Recorder's "office of this District, where such lands or hereditaments "are lying and being, within twelve months after the execu-"tion of such deed or conveyance."

It also provides, that unless such deed is acknowledged or proved and recorded as provided, it shall be void against subsequent purchasers for value. Subsequent statutes before 1816 authorized the acknowledgment or proof to be taken by the Clerk of a Court or Justice of Peace of the District where the land laid.

The acknowledgment, therefore, of Dodier in May 1816,

was nothing more than the *admission* that he made that paper in January, 1805. The same *fact* could have been "*proved*" by the subscribing witnesses, with the same force andeffect, if Dodier had refused to acknowledge; and there were witnesses to this alleged deed.

But on the 19*th of January*, 1816, the Territorial Legislature of the "Territory of Missouri" passed the following law: Be it enacted, etc., vide "Territorial laws," Vol. 1, p. 436, as follows: "1st. The common law of England, which "is of a general nature, and all statutes made by the British "Parliament in aid of or to supply the defects of the said "common law, made prior to the fourth year of James the "First, and of a general nature, and not local to that king-"dom, which said common law and statutes are not contrary "to the laws of this Territory, and not repugnant to nor in-"consistent with the constitution and laws of the United "States, shall be the rule of decision in this Territory, until "altered or repealed by the Legislature, any law, usage or "custom to the contrary notwithstanding."

The remainder of the statute provides that British statutes for punishment of crimes shall not be in force, and that the doctrine of survivorship as to joint tenants, and the doctrine of entails shall not be in force.

On the day after was passed a "statute of frauds and perjuries," which was not to go into effect till the first day of June, 1816. The first section of it (and all that relates to this subject) is substantially the fourth section of the English Act on the same subject, passed in the twenty-ninth year of Charles the Second, and is as follows:

"No action shall be brought whereby to charge any execu-"tor or administrator upon any special promise to answer for "any debt or damage out of his own estate, or whereby to "charge the defendant upon any special promise to answer "for the debt, default or miscarriage of another, or to "charge any person upon any agreement made in considera-"tion of marriage, or upon any contract for the sale of "lands, tenements or hereditaments, or any lease thereof

"for a longer term than one year, or upon agreement that "is not to be performed within the space of one year "from the making thereof, unless the agreement upon which "such action shall be brought, or some memorandum or "note thereof, shall be in writing and signed by the party "to be charged therewith, or some other person by him "thereunto properly authorized."

Since the passage of these two acts the Supreme Court of this State has always held, that the common law was in full force in this State, where not modified by statute, and that no interest in lands can be conveyed except by deed under seal.

Mors*e* *vs.* Anderson; 7 Mo., 337.
Long *vs.* Stupp, 49 Mo., p. 506.

Prior to January, 1816, it has been always held in this State, that the Spanish law was so far in force that lands could pass by parol conveyances or writings without seal.

Exactly what the law was in this respect between the adoption of the common law January 19, 1816, and the taking effect of the statute of frauds, June 1, 1816, has never been up or decided in this State, because no deed between those dates without a seal has ever been before the Court.

It is hardly worth while to cite authorities to this Court to show that for years before the time of James the First, the common law of England required a "deed of conveyance" to be a sealed instrument. Whenever the party undertakes to convey by deed it must be a sealed instrument. Coke Lit., Vol. 2, chap. 34, (Alienation by deed.).

Sheppard's Touchstone, page 204, chapter 9, says, "If "the feoffment be made by deed, then must the deed be so "made, written, read, *sealed* and delivered, as all other "deeds that are well made must be."

Besides, the statute of "Bargain and sale," passed in the 27th year of the reign of Henry the Eighth, enacted as fol-

lows: "No lands, manors, tenements or hereditaments, "shall pass, alter or change, from one to another by any "(deed) whereby any estate of inheritance or freehold shal "be made or take effect in any person or persons, by rea- "son only of any bargain or sale thereof, except the same "be made or done by writing indented, *sealed*, and en- "rolled in one of the King's Courts, or else within the "same county or counties wherein the lands so bargained "and sold do lie, before the *custos rotulorum* and two jus- "tices of the peace, and the clerk of the peace of the same "county, as witnesses. The enrollment to be within six "months next after the writing or deed is dated."

Sheppard's Touchstone, chapter 10, page 223; or Parkinson's edition of the English Statutes.

This statute being before the time of James the First, was adopted into this State (Missouri) as a part of the common law by the Territorial Statute of January, 1816, before cited.

There can be no doubt, therefore, that after the 19th of January, 1816, a "deed of conveyance" in the Territory of Missouri must be a sealed instrument.

But farther, the so-called "deed" in this case, from Dodier to Labeaume, was *not recorded* till the *5th of June*, 1816, which was five days *after* the statute of frauds passed by the Territorial Legislature, as before stated, had gone into operation.

It cannot be disputed, therefore, as the common law and statute of frauds were in full force, but that by our own decisions, this paper without testimonium or seal, was not a "deed or conveyance" on the 5th of June, 1816, and could not then be lawfully recorded in Missouri Territory under the Act of October 1, 1804, before cited, which only authorized the recording of "deeds or conveyances."

A "conveyance," according to Blackstone and the law dictionaries, is but another name for a deed, and means an instrument under ~~sale~~ seal

As it was not an instrument authorized to be recorded on

the 5th of June, 1816, its record imparted no notice to subsequent purchasers, and a copy of it, as offered in this case, cannot be used in evidence. These points as to instruments *imperfectly executed* were decided by Judge Redfield in the 19th Vermont, R., p. 245, a case that was elaborately argued and considered. It has also been decided by the Supreme Court of Missouri, that a deed not acknowledged or proved as required by the statutes, though recorded, imparts no notice—and a copy cannot be used in evidence, except since the passage of the statute in 1847 in this State.

Stevens *vs.* Hampton, 46 Mo. 408.

In this case all the plaintiffs except Mrs. Tatum claim title under deeds made before 1847, when, for the first time, a statute was passed in Missouri which declared a record of a deed not acknowledged according to law to be notice to subsequent purchasers.

There is no statute in Missouri, nor ever has been, making the copy of the record of a deed *not executed according to law* admissible in evidence, or its *record* impart notice.

It would, therefore, seem to be undeniable that on the 5th of June, 1816, the instrument under which defendants claim was not so executed that it could pass the title to land in Missouri Territory, and could not be lawfully recorded, and its record imparted no notice to subsequent purchasers, and a copy of it is not admissible evidence.

But again, I say the document, if it had been a *deed*, could not take effect at the *date* of its acknowledgment. It is well settled law, that in the absence of proof to the contrary, a deed takes effect, and is considered as delivered at its *date*, though acknowledged long afterwards. The acknowledment is nothing but an admission that the party executed it at its date. The same fact can be *proved* in this State, and could have been at any time since 1804, without going near the grantor. This paper was a good conveyance under the law at its date, and passed all the title Dodier had in the land

covered by it. To be sure, Labeaume lost the title by neglect in not putting it before the Commissioners, but that would not raise a presumption that Dodier intended to make him *a new deed* in 1816, by admitting he signed the paper in 1805. Therefore this acknowledment cannot be considered as a new deed in 1816, It is a well settled rule that a deed *good at the time it was first delivered*, cannot be re-delivered. That this so-called deed was *actually delivered* to Labeaume at the time of its date, is proved by Labeaume's own statement in his petition against the Dodier heirs. Record, page 26. He does not claim it as a deed in 1816, but claims it was one made to him in January 1805.

But further, if Labeaume had a good title under his "deed," he considered the boundaries so vague and uncertain, that he and his attorneys thought him only an owner in common with the heirs of Dodier, after Dodier's death. He, therefore, filed his petition in partition in June 1818, (vide Record, page 26,) against the heirs of Dodier, and had a tract of land set off to him under the proceedings and affirmed by the Court; which tract of land the U. S. Circuit Court has found *does not cover the land in dispute in this case.* Therefore, he, and those claiming under him, *are estopped from claiming any land* under this deed, *outside* of the land so set off to Labeaume, at his own request. This partition was under Territorial Statutes of Missouri, passed November 2, 1808, (vide Territorial Law of Missouri, page 204,) which Act is substantially as follows: "One or more persons, proprietors of land, desirous of having it divided, may apply to the Court of Common Pleas, (afterwards Circuit Court,) on petition of any party; notice having been given to opposite parties for at least four weeks by parties applying, if in the territory, if not, by publication; the Court shall appoint Commissioners, not less than three, nor more than five respectable householders not related to either party; the Commissioners shall take an oath; shall

proceed to the land; make a division among the owners as directed by the Court, according to their respective rights. A partition being made by at least a majority; they shall make a return in writing, duly acknowledged in open court or before a judge; that report shall be approved by the Court and recorded by the Clerk, "*and shall be a partition of such lands.*"

Afterwards, as appears, Record, page 28, Mrs. Labeaume, the widow and legatee of Louis Labeaume, brought a suit against the Dodier heirs for tresspass, committed *on the land set off to her husband*, and this case went to the Supreme Court of Missouri. Vol. 1, page 618, Missouri Reports.

Labeaume *vs.* Dodier, et al.

The Court there decided that the partition was valid, and that Mrs. Labeaume, the widow and legatee, *was bound by the partition* at the suit of her husband and testator.

The next ground upon which I have supposed the Court might have based the findings for defendants, is, that having found as a fact, that survey No. 422 was an "out-lot" within the meaning of the Act of Congress of June, 13, 1812, confirming to the inhabitants of certain villages of Missouri the "town or village lots, out-lots, common field lots, and "commons, in, adjoining, and belonging to, the several "towns or villages, named" (St. Louis being one), the Court then held that by virtue of said Act the *fee* to said tract of 500 arpents, passed to August Dodier in 1812, and the statute of limitations thus gave title to defendants. I have supposed this only because the counsel for defendant urged such a position as law. That the evidence in the case justified the Court in finding as a fact that Dodier before 1803 occupied and cultivated a small part of the concession of 500 arpents, claiming the whole, will not be disputed, but that the Court was authorized to find *as a fact* that the concession of 500 arpents was an "out-lot in, adjoining, and be-

longing to" the town or village of St. Louis, within the meaning of the said Act of June 13, 1812, *is most emphatically denied*. When the facts of location, possession and cultivation prior to December, 1803, etc., have been found, the question whether or not those facts constitute what is called a village lot, common field lot or "out-lot," has always been held to be a *question of law*.

Vasquez vs. Ewing; 42 Mo., p. 256.

The term "out-lot" is not known to the Spanish law. The lots known to that law as belonging to individuals in and adjoining towns and villages were town or village lots, and common field lots, and the "commons," common to all the inhabitants of the town.

The term "out-lots" was probably used by Congress to designate some possible odd pieces, cultivated by villagers, in and among the town lots and common field lots. The idea that the Supreme Court of Missouri have as to what is an "out-lot" may be found in Vasquez vs. Ewing, 42 Mo., on page 261, and cases there cited.

It must be a "lot," and it must be "in, adjoining, and belonging to, the village," (according to the Act of Congress), "and these lots are confirmed to the *inhabitants of "the village*, according to their respective rights in com- "mon thereto." This concession of 500 arpents is neither. The concession and survey to Dodier by the Spanish Government, shows that it was *six miles from the village*, and the survey shows it was bounded on the side towards the village by the "Royal domain." If the United States surveys of the common field lots follow the Spanish locations of the same lots, it would appear that *after* the concession to Dodier the Spanish authorities must have authorized the cultivation of common field lots, the farther ends of which touched the Dodier concession on the side towards the village—though none such were known when Soulard made his survey for Dodier in 1800, as the survey shows.

But what more conclusively shows it cannot be a "lot" of any kind, is the fact, that it was asked for by Dodier, and granted by the Governor, under the *colonization laws, according to the number of Dodier's family*. Dodier in his petition says he has a wife and six children, which under the colonization laws would give him 500 arpents, one hundred for himself, one hundred for his wife, and fifty for each of his children.

Vide Report of U. S. Commissioners, 3 Vol., State papers, p. 561, Duff Green's edition.

Also, 1st Vol., White's Recopilacion, p. 232, (Regulations of De Lemos.)

The Governor in his concession says he gives him an amount "*corresponding to the number of his family.*" This class of concessions was to farmers or rancheros, and had no relation to villages *or* "*the inhabitants of villages*," to whom was assigned the long and narrow common field lot for cultivation, the end next to the town in which they resided, and averaging from one to three arpents wide and always forty deep each, without any reference to the number of the family of the person cultivating them.

The plats and evidence in this case also show, that this survey to Dodier is outside of any thing ever recognized by the United States as common field lots or out lots, and it is even *now* two miles beyond the western boundary of the city of St. Louis. With such facts it could hardly be considered as "in adjoining, and belonging to," the *village* of St. Louis in 1812! Besides, Dodier was not "an inhabitant" of the village as the owners of common field lots were, living *in the village*, and using his field lot for cultivation. But the evidence shows that he resided on his concession, six miles from the village, and was not therefore an "inhabitant of the village."

But should this Court hold that the concession to Dodier was in 1812 an "out lot" adjoining the village of St. Louis; the next position that will be urged by the defend-

ant's counsel with great earnestness, is perhaps the most important, as it will establish one way or the other, a rule that will affect many cases—some past and some probably to come. The defendants assume the position that, a village lot, out lot or common field lot, though the claim to it was laid before the Commissioners, acting under the Act of March 2, 1805, and the amendatory Acts of 1806–7, and was *confirmed* by that Board; still, that the Act of June 13, 1812, before referred to as confirming village lots, etc., to the inhabitants, operated upon such lot so as to pass the *fee out of the government to the confirmee of the Old Board*, and that thus the statutes of limitation might commence to run at any time after 1812.

Though this Court has repeatedly decided that a confirmation by the Commissioners under the Acts of 1805–6–7, gives an indefeasible *equitable title*, but does not pass the fee out of the United States, and that the fee does not pass in such case till an approved survey has been made and a patent has issued; still, the defendants insist that when the land happens to come under the description in the Act of 1812, of a village lot, out lot or common field lot, *then* the Act of 1812 passes the fee, *proprio vigore*, to the person to whom the Commissioners had confirmed it under the Acts of 1805–6–7, and thus dispenses with the necessity of a survey or a patent.

This position is so novel, so at war with the *whole practice of the land department*, the provisions of the statutes themselves, and the principles laid down in the numerous decisions of this Court, and the Courts of Missouri in the construction of these statutes; that one can but admire the zeal with which it is asserted.

The provisions of the Acts of 1805–6–7, under which this land was confirmed, provide that after the confirmation by the Commissioners, a survey shall be made by the United States of the tract; that that survey shall be approved by the United States land department, and a patent certificate issued, and then a patent will be signed

by the President. This Court has decided, that until the survey is finally approved and the patent issued, delivered and accepted, the fee to the land does not pass out of the United States, so that the limitation laws of a State can take away the rights of the patentee. This Court has also decided that this survey though once approved may be set aside and annulled by the land department, and a new survey made, locating the land in a different place, and that the patent may be recalled, if not accepted by the patentee, and a new patent issued for the land as located by the new survey.

Magwire *vs.* Tyler, 8 Wallace.
Gibson *vs.* Chouteau, 13 do., and other cases.

In pursuance of these provisions of the law, and the decisions of this Court, the Land Department has, for nearly seventy years, always made surveys of the land confirmed by the said Commissioners, approved or rejected them, and located the land so confirmed wherever the land officers thought proper, and issued patents therefor, and the confirmee has been compelled to take his land wherever the department saw fit to give it to him. And all this has been done to ALL TRACTS confirmed by the Commissioners.

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But the statute of June 13, 1812, dispenses with all this machinery—does not call for a survey—a patent certificate, or a patent, and gives no power to the Land Department to control in the least the location of the land, or the size or form of the lot. It simply gives, by force of the Act, the "village lot, out lot or common field lot" to the villager or his representatives, who happened to cultivate it before December 20, 1803, and gives it, of whatever *size and in the location it can be proved in Court* it was, when cultivated

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before 1803. It leaves the location of the land, the size of the lot and all the facts about it entirely to the Courts.

As a matter of convenience to determine as well as they could what land was so given, the Land Department has generally, though not always, surveyed these lots, but the Courts have never allowed these surveys to have the least effect in *altering* or *determining* the location, or fixing the size of the lot, any further than making such survey *prima facie* evidence of these facts, subject to be controlled entirely or overthrown by evidence, verbal or written, in Court.

Glasgow *vs.* Hortiz, 1st Black, U. S. R.
Guitard *vs.* Stoddard, 16 Howard, 494.
Clark *vs.* Hummerle, 36 Mo., 620.

The Act of June 13, 1812, contains this important proviso, viz: "That nothing herein contained shall be *construed* "*to affect the rights* of any person claiming the same lands, "or any part thereof, whose claims have been confirmed by "the Board of Commissioners for adjusting and settling claims to land in the said territory." This proviso must be held to have some meaning and effect. It would be nonsense if it was intended to *protect* from any one claiming title under this Act the land confirmed to some other person by the Commisioners, because the law under which the Commissioners acted, as we have seen, made the decision *conclusive* upon the question of title. Therefore, in this case, Dodier's land, which was confirmed to him in 1810, could not have been taken by any one claiming it under the Act of 1812, if there had not been this proviso in it. All the decisions of these Commissioners were *before* June, 1812, as can be seen in the third volume of the American State Papers.

What then did this proviso mean? The effect of it, and the evident meaning of the provisions of the two statutes, are very well expressed and summed up in the language of the Supreme Court of Missouri, in the case of

LeBeau *vs.* Gaven, 37 Mo. page 556, where the Court says: "It would seem to be very plain that Congress did "not intend by this Act, (1812,) to interfere with claims "which had been previously presented, investigated and "finally confirmed. These claims were to be proceeded "with until the final evidence of title should be completed in "conformity with the provisions of the former Act." This language clearly shows that the Court repudiated the notion, that the Act of 1812 passed the fee to lands confirmed by the Board of Commissioners.

The land in dispute was confirmed to Dodier in 1810. Under that confirmation it was necessary for him to have it surveyed and located where the government saw fit; to have that survey approved, and a patent issued. Till that was done, nothing was final as to its location, But if the Act of 1812 was to "affect his rights," then it repealed the provisions of the Acts of 1805-6 and 7, as to surveys, locations and patents, and enabled him to prove up in Court his title to other land than the Commissioners gave him, and in a different place.

This would be the case if his land was an "out lot," but would not, if it was a farm or ranche, so that the Act of 1812 would thus "affect the right" of *some* persons claiming under confirmation by the Commissioners, but would not of others.

Then again, it would deprive him of the right to plead the *survey and patent* as the source of his title as against the squatter who sees fit to say: "Oh, no, you got a com-"plete title in 1812, and now I have got it away from you "by adverse possession, while you was foolishly supposing "the fee was still in the government, and was looking after "your survey and patent, which are of no use now you have "got them; and the land department was as much mis-"taken as you were, surveying your land and giving you a "patent, when you had no use for either."

In such case, under which Act would Dodier be compelled to prove up his title in Court? Must it be by record

under the confirmation of the Commissioners, and survey and patent, or under the Act of 1812, verbally, without survey or patent; or must he make proof under both Acts?

But though this point, as to whether or not the Act of 1812 has *any effect* on a lot confirmed by the Commissioners, has never been *formally* decided by this Court, still I say it was fully before this Court by the facts, in the case of Maguire *vs.* Tyler, 8 Wallace, and *must have been* either disregarded by the Court and counsel in the case as unworthy of being made, or entirely overlooked by all parties; and the attorney for the defendant in this case at bar, will have the high honor of first finding out an error in that case, *which will, or should, reverse it.* What are the facts on this point in this case of Maguire *vs.* Tyler? A concession was made to Brazeau by the Spanish Government of four arpents by twenty, in 1794. By the proceedings before the Commissioners and the proof in the case, it appears that he inhabited and cultivated it for the years 1794,-5-6 and 7 and till 1798, when he sold all of it to Labeaume, except four by four arpents on the south end. In that case, when it was before the Courts in Missouri, as reported in the 40 vol. Mo. Reports, page 408, the Court found as facts on proof: "That Brazeau took *possession* of "his four by twenty arpents *immediately* upon its being "granted to him in 1794, and in 1798 he sold to Labeaume "all but four by four arpents; and that the land is *within* "*the outboundary* as surveyed in 1840, under the Act of "1812." This last finding settles the fact that it was a village lot, or "out lot," and within the terms of the Act of 1812.

This Court in their opinion in the 8th of Wallace, page 658, says: "The Commissioners' minutes show, and that "proof was introduced to show, that the original donee of "the 4x20 arpents was the head of a family; that he in- "habited and cultivated the land at a period sufficiently "early to bring the case within the provisions of the Act of "Congress." The 4x4 arpents and an additional quantity

conceded to Labeaume adjoining them, were confirmed to Labeaume by the Commissioners in 1810, and at the same time the tract of 4x4 arpents was confirmed to Brazeau. The tract of 4x20 arpents was surveyed by Soulard, the Spanish surveyor, soon after it was granted to Brazeau, and his survey filed.

As this 4x4 tract confirmed to Brazeau was near the village, and *within* the out boundary line required to be run by the act of 1812, for the purpose of taking within it all the land confirmed by the act of 1812, and was occupied and cultivated by Brazeau prior to December, 1803, the fee to that piece must certainly have passed to Brazeau—*if* the act of 1812 operated on lots or out lots *confirmed by the commissioners*. It was abundantly proved and not disputed, but what Tyler and her grantors, claiming under Labeaume, had been in actual possession, claiming title to the tract of 4x4 arpents, claimed by Magwire under Brazeau, for about fifty years before the suit decided in 8th Wallace was brought.

The facts in the case show that the tract confirmed to Labeaume was surveyed for him, and the tract of 4x4 arpents was surveyed three times for those claiming it under Brazeau—first inside of Labeaume's survey, then outside, and then inside again, where this Court finally decided it belonged. This controversy lasted thirty years, and all this time the Land Department claimed and exercised the right to determine the location, and this Court has upheld that right.

If the Act of 1812 operated on it as it did on other lots *not confirmed* by the commissioners, then it passed the fee to the lands *cultivated before* 1803, and the Land Department was guilty of usurpation, and had no authority at all to determine the location, and a survey of it was of no force or effect, and a patent of no use, as this Court has repeatedly decided, and especially in

Guitard vs. Stoddard; 16 Howard, p. 508.

Glasgow vs. Hortiz; 1st Black., p. 600.

This case of Magwire vs. Tyler passed through the hands of many eminent counsel and under the judgment of many learned judges on this bench and the Supreme Court of Missouri, *and not one of them ever suggested that the Act of* 1812 *operated to pass the fee of the* 4x4 *tract to Brazeau or those claiming under him, so as to set the statute of limitations running in favor of those who had been in possession of it, claiming title to it for fifty years*—but on the contrary, *this Court most emphatically decided*, that the fee was not out of the United States till the last survey was finally approved and the patent issued in June, 1862, and that the statute of limitation *did not bar the plaintiff nor begin to run*, till after the patent issued in June, 1862.

If, therefore, the position taken here by defendant's counsel is correct, that the Act of 1812 passes the fee to a "village lot or out lot" that had been previously confirmed by the commissioners, to the same person to whom it had been confirmed; then there was committed a most terrible mistake in the management of the Magwire and Tyler controversy, and not less than one hundred thousand dollars in costs and expenses *was unnecessarily wasted*, and the decision in that case *is all wrong*, and ought to be reversed, and probably *can be* in Missouri, where one judgment in an action of ejectment is not conclusive.

The last hypothesis I have put as to the ground upon which I have supposed Judge Treat may have decided this case for the defendant is this, viz: that he may have held that the alleged deed of Dodier to Labeaume was of no force or effect; that the Act of 1812 did not pass the fee to an "out lot" confirmed by the Commissioners, and that the partition obtained by Labeaume was of no importance, and still have given judgment for defendants on the ground that the statute of limitations was a defense notwithstanding the patent was not issued, nor the fee out of the United States till 1873.

I would not say that such was the ground upon which the decision was made, because Judge Treat well knows

it would have been in direct violation of the principles laid down by this Court in the case of

Gibson vs. Chouteau, 13 Wallace.

Nominally, this ruling below is that of the Circuit Court, but by the record it appears that the decision is by the District Judge, sitting as Circuit Judge, and we all know his hostility to the doctrine of this Court in the case last named.

But I shall not argue this point as I have no doubt the decision of this Court will be in accordance with its former decisions. I know of no other possible view of the law upon the facts in this case, then those to which I have referred, on which this case could have been decided by the Circuit Court in favor of defendant, and I therefore submit the case on the points I have presented.

D. T. JEWETT,
Att'y for Plaintiffs.

IN THE

Supreme Court of the United States.

No. 246.—October Term, 1875.

Mary Ryan and others,

vs.

Henry S. Carter and Jacob Becker.

In error to the Circuit Court of the United States for the Eastern District of Missouri.

Brief of Montgomery Blair, for Defendants in Error.

STATEMENT.

This is an action of ejectment, brought 27th August, 1873, for part of a tract of land known as survey 422, situate in the county of St. Louis.—(p. 3.) The parties claimed from a common source of title, and defendants also relied on the statute of limitations. A jury was waived, and the court found and gave judgment for the defendants on the 8th of June, 1874. The land was confirmed to Auguste Dodier in 1810 by the old board, (p. 21,) and the patent issued August 9th, 1873.—(p. 23.) The plaintiffs claim under certain of the heirs of said Dodier.—(pp. 23 and 24.) Dodier and wife, by deed of 1805, (p. 19,) conveyed a part of his confirmation to Louis Labeaume. The land in question is part of the land conveyed to Labeaume. Labeaume died in 1821, and by will of 1817 left the property to Susan, his wife; and by mesne conveyances her title passed to defendant Carter. Defendant Becker is defendant Carter's

tenant; and said Carter and those under whom he claims, had been in the open, notorious, and undisputed possession of the land for more than thirty-five years next before the commencement of this action.—(p. 24.) In 1818, (pp. 25, 26, 27, 28,) partition was made, on Labeaume's petition, between him and the heirs of Dodier; and the land set off to Labeaume does not include the land in question. In 1822 (p. 28) Mrs. Labeaume brought an action of trespass against the widow and heirs of Dodier, and said deed and proceedings in partition were admitted in evidence at the trial. Judgment was finally given for defendant, on 8th May, 1827.

The act of 13th June, 1812, (2 Stat., 728,) declares that "the rights, titles, and claims to town or village lots, *out-lots*, common fields, and commons in, adjoining, and belonging to the several towns or villages of St. Louis, &c., in the Territory of Missouri, which lots had been inhabited, cultivated, or possessed prior to the 20th of December, 1803, shall be, and the same are hereby, confirmed, &c. * * * Provided that nothing herein contained shall be construed to *affect* the rights of any person claiming the same lands or any part thereof, whose claims have been confirmed by the Board of Commissioners for adjusting and settling claims to lands in the said territory."

The court found (p. 25) that survey No. 422 was an out-lot of the village of St. Louis; that Dodier was an inhabitant of the village, and had cultivated and possessed the lot prior to the 20th December, 1803; and decided that his claim was not excepted out of the granting clause of the act of 1812 by the proviso, by reason of its having been previously confirmed by the Board of Commissioners to Dodier.

ARGUMENT.

I. The first question is as to the effect of the partition. The deed was for the whole estate in a specific part of

the tract, and hence there was no partition properly so called. All that was required was the marking on the ground of the division line, which was simply the work of a surveyor; and the findings in this case showing that the land in dispute was part of the land granted to Labeaume, as defined by the deed, but not part of the tract assigned to him by the commissioners in partition, are equivalent to a finding that the lines of partition were not in fact correct. And for this reason, perhaps, neither party regarded them; for it is shown by the suit in 1822. by Mad. Labeaume v. The Widow and Heirs of Dodier, as reported in 2 Mo., p. 618, that these heirs held and claimed part of the land assigned to Labeaume, whilst in this case it appears that Labeaume continued to hold and claim according to his deed. A division line between adjoining proprietors, whether established by partition properly so called or merely by agreement between the parties, if adhered to, would prevent a deed from estopping either of them from claiming up to the line. But when neither party recognized the partition, the original contract between them, shown by the deed, ought to control.

II. The second question is whether the proviso of the act of 1812 withdraws Dodier's claim from within the enacting clause. That it does not appears (1) from the face of the act itself, from its object and the literal import of the language, (2) by considering it in connection with other acts in *pari materia*, and (3) by the decision of this court.

(1) *a.* The act of 1812 is one of a series of acts adopted to fulfill the obligations of the government to protect the people within the territory acquired from France by the treaty of 1803, in their rights of property. The acts of 1805, 1806, and 1807, under which the Board of Commissioners referred to in the proviso had been appointed, had been found by the board to be unjust in their opera-

tion, particularly in the requirement of documentary evidence of title, which excluded from confirmation a great number of valid claims. The act in question dispensed with such proof with respect to the claims enumerated in it, when the land had been inhabited, cultivated, or possessed under the former government.

From the terms of the proviso itself, it is manifest that its object was merely to protect the claims of those who had obtained confirmation under former laws from any claim under the granting clause of this act; an object which is fully accomplished by merely preventing the act from creating any title which would *conflict* with that of "any person claiming the same land whose claim had been confirmed by the Board of Commissioners." Certainly there is no reason why those who had not only inhabited, cultivated, and possessed their land prior to 1803, as required by this act, but had the additional merit of having exhibited title papers to the commissioners, which had been recognized and confirmed as valid, should be less favored by the act of 1812 than those who had only possession to show for tittle. In U. S. vs. Fisher, 2 Cr., 399, the language of Mr. Justice Washington would apply strongly to such a case, even if the literal import of the words would exclude it from the benefits of the act. He says: "If the literal expression of the law would lead to absurd, unjust, or inconvenient consequences, such a construction should be given as to avoid those consequences, if from a purview of the law and giving effect to the words, it may be fairly done."

Again, it is a well settled rule of law that a proviso will be strictly construed; and that when it admits of two constructions, that by which the smaller number of cases will be taken from within the operation of the enacting clause will be adopted.

"The general rule of law," says this court in U. S. vs. Dickson, 15 Peters, 165, "which has always prevailed and become consecrated as a maxim in the interpretation

of statutes, is that when the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; *and those who set up any such exception must establish it as being within the words as well as the reason thereof.*" This is substantially the same rule above quouted from 2 Cr. It is not enough that the words literally construed should embrace the case. It must be within the reason of the proviso also.

It will not be pretended that the title in question falls within the reason of this exception. To allow Dodier's title —a title which the commissioners had confirmed—to be completed by the act of 1812, would not create any conflicting title, and did not, therefore, "*affect*" it in the manner which it was the only object of the proviso to guard against. The *proviso* was inserted to benefit the claims referred to. It would not be consistent with this object to construe the act to put them on a less favored footing than claims of less merit.

a. The proviso literally construed does not apply to the title in question. The word "affect" sometimes means to "act upon," to "influence;" and if this meaning be given, the proviso might be construed to prevent the act from acting upon Dodier's title at all. But the word is more frequently used to mean to "act upon injuriously," to "weaken," to "debilitate," as when we say a man's reputation or health is affected; and the Latin word "*afficio*," from which the word is derived, was also used in this sense. See Dr. Andrews' Latin-English Lexicon, where a passage from Livy is cited for this use of the word.

(2.) The act of 1807, under which the claims referred to were confirmed, and which, being in *pari materia*,

is to be considered as part of the act of 1812, (Patterson vs. Winn, 11 Wheat., 94,) is conclusive of the sense in which the word is used in the act of 1812. The 3rd section of that act (2 Stat., p. 440) confirms the common to New Orleans, with a proviso "that nothing herein contained shall be construed to *affect* or *impair* the rights of any individual or individuals to the said common, which are derived from the French or Spanish Governments." The word "*affect*" is here used as synonymous with "*impair*." As the act of 1812 was devised by the commissioners who had been carrying out the law of 1807, its familiar phraseology would naturally be adopted to effectuate a similar purpose, improved, however, by the omission of the tautology; and accordingly both provisos use the word "*affect*" for the common object of protecting former grants; the last act omitting the equivalent and unnecessary word "*impair*."

There are various other acts providing for the confirmation of these claims: as the act of 1814, 3 Stat., 121; 1824, 4 Stat., 52; 1834, ib., 367, all containing provisos to prevent *conflict* with grants by the titles given by them. The provisos in every case are limited to the prevention of *conflict between the titles*. This would not have prevented the same claimant from procuring a title under every one of the acts.

(3.) The question is not an open question. One of the points decided in the leading case of Strother vs. Lucas, 12 P., 410, was that the confirmation of 1812 inured to the confirmees under previous acts. Lucas claimed to hold two exactly similar titles to those claimed by the defendants here—one a confirmation by the commissioners, and one by the act of 1812. Strother claimed under a complete grant by the act of 1816. The form in which the question was presented there was whether Chancillier's claim, held by Strother, was barred by

the failure to file it as required by law; and the court held that it was barred, but it was barred only because "the defendant claimed by grant from the United States," (p. 456,) and held *two* several titles, both of which the court declared to be valid, (p. 454): *first*, "the commissioners had decided on the identical claim in 1809–10" in his favor; and *second*, "Congress had made a general confirmation of all the claims of the then inhabitants of St-Louis, of their title to the common-field lots in 1812, when the defendant was an inhabitant thereof, and in actual possession of those in controversy, and by the act it was *provided* that it should not affect any confirmed claims to the same lands." And the court adds, with respect to this last title, that "as the act directed no further steps to be taken, the title became complete. * * We must, then, take the defendant as one holding the premises in controversy by a grant of the United States, and, as their grantee, entitled to all the protection of the law appropriate to the case. * * That a grant may be made by a law as well as a patent pursuant to a law, is undoubted (6 Cr., 128); and a confirmation by law is as fully, to all intents and purposes, a grant as if it contained a grant de novo. The plaintiff, therefore, is brought within the *two* provisions of the law; that by Madame Chancillier not having filed her claim within the time limited by law, she cannot set up any claim under any act of Congress, or be permitted to give any evidence thereof in any court *against a person having a grant by the United States, under the confirmation of the commissioners and the act of* 1812."

It was, therefore, expressly decided in that case that Lucas held two titles: *first*, a complete grant under the act of 1812; and, *second*, an incomplete grant by the confirmation of the commissioners; and that the plaintiff was barred by *both of them* from giving his title in evidence. And, moreover, it is manifest, from the recital

by the court of the proviso in question here, that the very question here presented was duly considered. That decision has stood in all respects unquestioned for nearly forty years. It showed that the patent was unnecessary to complete the title of Dodier. It would tend greatly to unsettle titles to establish a different rule at this late day.

MONTGOMERY BLAIR.

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No. 777 3-86 Jus. Clifford

IN THE

Supreme Court of the United States.

PAXSON KITCHEN, Appellant,

vs.

EDMUND D. RANDOLPH and others, Appellees.

Appeal from a Decree of the Circuit Court of the United States for the Eastern District of Pennsylvania in the Third Circuit, Directing the Sale of the Wilmington and Reading Railroad.

SUR MOTION FOR ORDER DIRECTING ADDITIONAL SECURITY ON SUPERSEDEAS BOND.

AFFIDAVITS FOR MOTION.

LEWIS WALN SMITH,
J. HUBLEY ASHTON,
Counsel for Randolph, Appellee.

Allen, Lane & Scott's Printing House, 233 South Fifth Street, Philadelphia.

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In the Supreme Court of the United States.

Kitchen, Appellant, vs. *Randolph and others, Appellees.*	In the matter of the appeal from a decree of the Circuit Court of the United States for the Eastern District of Pennsylvania, in the Third Circuit.

SUR MOTION OF APPELLEE FOR ADDITIONAL SECURITY ON *SUPERSEDEAS* BOND.

Motion.

Now, to wit, October 9th, A. D. 1876, comes the appellee, Edmund D. Randolph, by his counsel (appearing specially for the purpose of making this motion), and showing the court that the amount of the security heretofore ordered to be entered by the appellant upon obtaining the *supersedeas* allowed by the Honorable Samuel F. Miller, on the 29th of September, A. D. 1876, is insufficient to secure the sum recovered for the use or detention of the property and the costs of the suit and just damages for delay, with costs and interest on the appeal, as is in such case required by the statutes and rules of this court, moves (on the refusal of the court to vacate the said order of *supersedeas*)

for an order directing the appellant to give security in the further amount of $300,000, within days, or otherwise that the said order for a *supersedeas* be held vacated and of no effect.

Paxson Kitchen, Appellant,

vs.

Edmund D. Randolph et al., *Appellees.*

Appeal from decree of Circuit Court of Eastern District of Pennsylvania. In the Third Circuit.

AFFIDAVIT OF EDMUND D. RANDOLPH.

Edmund D. Randolph, being duly sworn according to law, deposes and says:—That he is complainant in the court below, and one of the appellees in the Supreme Court in the above-entitled cause; that on the sixth day of June, A. D. 1876, the Circuit Court for the Eastern District of Pennsylvania entered a final decree in the suit of Randolph *vs.* The Wilmington and Reading Railroad Company and others, and finding *inter alia* that there was due and unpaid to deponent and his fellow-bond-holders, under the mortgage of the Wilmington and Reading Railroad Company, dated March 3d, 1868, the sum of $1,212,-500, with interest thereon at seven per cent. for one year before the filing of his bill of complaint, and directing the said company to pay said sum, being $1,297,375, to the trustees named in said mortgage, for the use of deponent and his fellow-bond-holders; that since the filing of said bill by deponent there has fallen due and remained unpaid further interest on said principal sum, amounting to $127,300 additional, so that the amount decreed to be paid by said decree is $1,424,675; that the annual interest on the said sum so decreed to be paid is $99,727.

Deponent is informed and believes, and the records of the court so show, that one Paxson Kitchen, an alleged holder of certain bonds of the Wilmington and Reading Railroad Company, secured by a mortgage of the company dated eighteenth

day of March, 1870, being a junior mortgage to that by which deponent is secured, applied to his Honor, Mr. Justice Miller, one of the associate justices of the Supreme Court of the United States, for the allowance of an appeal from the decree of the said Circuit Court of the United States, and for an order of *supersedeas*, which application was allowed and an order of *supersedeas* issued, security being given in a *supersedeas* bond, in the sum of $1000, and that the said order was served September 30th, 1876; that by reason of said order of *supersedeas*, the sale of the Wilmington and Reading Railroad and all the property, for above-recited debt, which was decreed to take place on the second day of October, 1876, is postponed, and all proceedings stayed.

Deponent further says, that he is advised by counsel that the rules of the Supreme Court of the United States require that, upon the allowance of an order of *supersedeas*, in the case of mortgaged property, like the present, that a *supersedeas* bond shall be given, "in an amount sufficient to secure the sum recovered for the use or detention of the property and the costs of the suit, and just damages for delay, and costs and interest on the appeal;" that under the provision of the said rule, had the facts of this case been presented to his honor, on granting the order of *supersedeas*, he would have fixed the amount of the bond at a sum many times larger than $1000, and for the following reasons:—(1.) That the delay incident to the hearing of the appeal in the Supreme Court will cause an increase of the bonded debt, by reason of the accumulation of interest, of between $200,000 and $300,000; (2.) That as the mortgaged property is in the hands of receivers who have neither the money nor the freedom to replace the injury done to the road by wear and tear, its condition at the end of two years will have vitally deteriorated, and the damage done by delay will many times exceed $1000.

Deponent is informed that if the road be sold at once it will probably bring a fair price, or if purchased by the bondholders, is in such a condition that by an outlay of about $40,000 it might be put in condition to avoid the threatened loss; but if it remain for two years without such an expenditure, its value as

a security will be seriously injured, if not totally destroyed; that if, at the end of that time, plaintiff and his fellow-bond-holders have no remedy except upon the bond for $1000 filed, they will suffer great loss.

EDMUND D. RANDOLPH.

Sworn to before me, this third day of October, 1876.

[SEAL] JOSEPH GUTMAN, JR.,
United States Commissioner, Southern District of New York.

Kitchen, Appellant,
vs.
Randolph et al., *Appellees.*

AFFIDAVIT OF MATHEW BAIRD.

M. Baird, being duly sworn according to law, deposes and says:—That he is familiar with the details of railroad management, having been for many years a director in numerous railroad corporations; that he is informed that the Wilmington and Reading Railroad has been, for about eighteen months, in the hands of receivers, appointed by the Circuit Court of the United States, and that during that time the price of the first mortgage bonds of said corporation has fallen from about sixty-five to twenty-five per cent. on their face; that the reason for this he believes to be the deterioration in the value of the mortgaged property, arising from the fact that the receivers have had no money to expend on permanent repairs and their inability to manage the road with the freedom of judgment and action which could belong only to owners; that he has had occasion to examine the report of an expert, which, however, was not received until September 30th, 1876, the day after the granting of the *supersedeas* in the above cause. From that report he learned

that which his experience in railroad management had led him to infer, that the expenditure of a large sum of ready money on permanent repairs to said road was absolutely necessary within the next few months, to save the property from ruinous depreciation. If the property is allowed to remain in the present condition, without the required expenditure, for the next two years, he believes that the value of the security of the first mortgage bondholders will be substantially entirely gone. He believes that if the property be now exposed for sale, it might reasonably be expected to bring a fair percentage on the face value of the first mortgage bonds; or if purchased by said bondholders they could, by the prompt expenditure of over $40,000 in cash, have some security for their investment; but if a delay of two years should ensue, with the property deteriorating as it is, the value of the security will be greatly impaired, if not entirely destroyed; that the security of $1000 will hardly pay costs of court already incurred, and is utterly inadequate to in any way protect the appellants against loss by delay.

Deponent further says that he is chairman of the attorneys in fact appointed by $1,087,400 of first mortgage bondholders, and that he and his colleagues represent over six hundred different investors, many of whom are trustees or women, and that the delay threatened will be to them almost a total loss, unless they be able to look to the *supersedeas* bond for redress, should the appeal be decided in their favor.

Deponent further says that neither he nor his colleagues received any notice of the application of an appeal or *supersedeas* until their counsel was served, on September 30th, 1876, and that he is informed that no notice was served on counsel until that date, although the first decree was entered on the sixth day of June, previous.

M. BAIRD.

Sworn and subscribed before me, the fourth day of October, 1876.

JOHN URIAN,
Alderman.

[SEAL]

Kitchen, Appellant,

vs.

Randolph et al., *Appellees.*

AFFIDAVIT OF THOMAS HASSARD.

Thomas Hassard, being duly sworn according to law, deposes and says:—That he is a civil engineer, and is familiar with the condition, management, and requirements of many of the railroads of this country; that he has been for over forty years connected with the business of constructing and operating railroads; that at the request of M. Baird, Esq., on behalf of certain first mortgage bondholders of the Wilmington and Reading Railroad Company, he, on the 22d of September, commenced a detailed examination of the condition and requirements of that road; that he did so, not with a view to these proceedings, but to enable the committee of bondholders to judge of the value at the sale which was then supposed would take place on the 2d of October; that in the discharge of this duty he walked over the line of the said road, as well as rode over it, and carefully examined its condition, both as to the road-bed, construction, and equipment; that he concluded his labor and reporte the result on the thirtieth day of September; that he found the road in a fairly satisfactory condition so far as the ordinary repairs were concerned, but he also found that an expenditure of at least $40,000 was necessary to keep the road in the condition immediately needed for the business that it has to-day. The money expended by the receivers has been devoted to ordinary repairs, but has not been sufficient to keep the track and rolling stock in the proper condition for such a road. This sum of $40,000, or the larger portion, should be expended within the next six months, and is required principally upon the track and the bridges, for without a large supply of new ties and new iron the track would become useless; that the cross-ties, bridges, rails, and rolling stock would be almost entirely destroyed; that if the road should remain for two years without such an expenditure as

that above indicated, it will have so much depreciated in value by reason of decay incident to the delay, that it could not be placed in the condition it is to-day by an expenditure then of over five times the $40,000 now required.

That during the two ensuing years it will be necessary for the owners to make constant general repairs to prevent depreciation, in addition to the special immediate expenditure of $40,000; that if the road be now sold it would bring a far larger price than it would if sold two years hence, supposing that during that time it remained under the present system of management in regard to repairs.

THOS. HASSARD.

Sworn and subscribed before me, this sixth day of October, A. D. 1876.

CHARLES CARVER,
Notary Public.

[SEAL]

Kitchen, Appellant,

vs.

Randolph et al., *Appellees.*

AFFIDAVIT OF ROBERT FRAZER.

Robert Frazer, being duly sworn according to law, deposes and says:—That he is in the employ of the receivers appointed by the Circuit Court of the United States for the Eastern District of Pennsylvania, in charge of the Wilmington and Reading Railroad, and is, under them, the general manager of said road; that he is thoroughly familiar with its present condition and future needs, it being part of his duties to constantly pass over the said road; that at the time of the appointment of said receivers the bonds of said company were selling at about sixty-five dollars on the hundred; that the duty of the said receivers

is, as they have frequently informed him, limited to endeavoring, out of the current receipts, to keep the road in ordinary repair, but not to extend so far as replacement; and that the moneys that come to the hands of the receivers are substantially only sufficient to carry out their purpose; that by reason of the failure to replace the loss by wear and tear, the mortgaged property is daily deteriorating, so that he is informed that at the present time the bonds are selling at about twenty-five per cent. of their face value; that at the present time, if the road was sold, it would probably bring a fair percentage on the first mortgage bonds, or if purchased by them, they could, by the immediate expenditure of upwards of $40,000, in addition to ordinary repair, put the road in such a condition as to resist the rapid deterioration threatened in the future. If, however, the road should remain for two years in the hands of the receivers, with only the expenditures necessary for ordinary repair, it would, at the expiration of that time, be in so injured a condition that for all practical purposes it would have ceased to be a security at all. Within that period it will be required that several bridges be rebuilt, and three trestle-works either filled up or rebuilt, and if such should not be done at the expiration of that period the road would be vitally injured by the delay. That from his intimate personal knowledge of the road he can say, that the damage caused by two years' delay in the hands of the receivers, with their limited means and powers, would many times exceed the sum of $1000.

ROBERT FRAZER.

Sworn to and subscribed before me, this second day of October, A. D. 1876.

CHARLES CARVER,
Notary Public.

[SEAL]

Kitchen, Appellant,

vs.

Randolph et al., *Appellees.*

AFFIDAVIT OF EDWARD S. BUCKLEY.

Edward S. Buckley, being duly sworn according to law, deposes and says:—That he is a party in interest in the above-entitled suit, being a holder of first mortgage bonds of the Wilmington and Reading Railroad Company, and having contributed to the expenses of the said suit; that he, together with four other bondholders, held and controlled, as attorneys in fact, bonds secured by said first mortgage to the amount of $1,087,400; that the total amount of outstanding bonds is about $1,212,500; that by decree of the Circuit Court of the United States the amount due the said first mortgage bondholders, including overdue coupons, is about $1,425,000; that the annual interest thereon is about $99,750.

Deponent further says, that on the sixth day of June, 1876, the said Circuit Court made a decree directing the sale of said railroad and property covered by said mortgage on the second day of October, A. D. 1876; that on the twenty-ninth day of September, his honor Mr. Justice Miller granted an appeal and an order of *supersedeas* and fixed the amount of the *supersedeas* bond at $1000; that the appellees had no notice of said application or they could have shown to the justice the total inadequacy of the bond accepted as any protection; that since the acceptance of the said bond the relations of the parties to the suit have changed, and new facts have been discovered which, even had the amount then been sufficient, it would have ceased to be so in view of the changed circumstances and new knowledge. The following are the facts since discovered:—

1. That on the 29th of September the *supersedeas* bond was approved; that on the 1st of October, two days subsequent thereto, the corporation defendant defaulted on its semi-annual

interest on said first mortgage bonds to the additional extent of $42,337.

2. That on the thirtieth day of September deponent received for the first time information as to the value of said mortgaged property from an expert, who had been employed to report on the same, and as to the damage which would accrue to the same by reason of the delay incident to the hearing of the said appeal in the Supreme Court; that from the said report it appears that an expenditure of over $40,000 upon the said road is absolutely requisite within the next few months to save it from immense depreciation in value; that he is informed and believes that should the said *supersedeas* stand unvacated, the said railroad would, during the pendency of the appeal, say from two to three years, remain in the hands of the receivers appointed by the Circuit Court; that the said receivers have no money other than current receipts nor have they the power to raise any money, and that all of such receipts are needed for running expenses and ordinary repairs; that none of it can be applied to the purposes for which the sum of $40,000 is needed. He is informed and believes if the road be sold immediately it would bring a fair percentage on the face value of the first mortgage bonds, but that if it remain for two years without the needed expenditure it would be practically worthless, by reason of deterioration and decay.; that the loss by delay on the question of interest alone would be about $300,000 in three years—the road not being able to earn in the hands of receivers enough to pay the interest —and that it is difficult to say how much additional loss would be caused by the delay for that time to expend the necessary money on replacement, but he is informed and believes that it would amount to almost the absolute ruin of the mortgaged property.

EDWARD S. BUCKLEY.

Sworn and subscribed before me, this day of October, 1876.

Kitchen, Appellant,

vs.

Randolph et al., *Appellees.*

AFFIDAVIT OF L. DU PONT.

L. Du Pont, being duly sworn according to law, deposes and says:—That he is one of the parties in interest in the above-entitled suit, being a bondholder under the mortgage of the Wilmington and Reading Railroad, dated March 3d, 1868, and having contributed to the expenses of the said suit; that he, together with four other bondholders, was, at a general meeting of first mortgage bondholders, appointed attorneys in fact to represent their interests, and that he and his colleagues represent $1,087,400 of the said bonds, the said mortgage being for $1,250,000, of which, he is informed, that upwards of $30,000 have been canceled by the sinking fund; that no interest has been paid on said bonds since October, A. D. 1874, and that, by the decree of the Circuit Court of the United States, the amount at present due the first mortgage bondholders is about $1,425,000; that the annual interest on the said sum is $99,750; that deponent is informed that the appeal to the Supreme Court of the United States, allowed by the Hon. Samuel F. Miller, will involve a delay in the sale of said railroad of upwards of three years should the order of *supersedeas* remain unrevoked; that by reason of such delay the bonded debt of said company would be increased, as to the first mortgage bondholders, by accumulated interest, in the sum of about $300,000.

Deponent further shows, that on the fifth day of May, A. D. 1875, the said railroad was, on the petition of some of the second mortgage bondholders, placed in the hands of receivers; that at the time of such action the bonds secured by the first mortgage were, he is informed and believes, selling in the open market, in the city of Philadelphia, at between sixty and seventy

per cent. of their face value; that by reason of the absence of money in the hands of the receivers and their crippled freedom of action, the railroad has steadily deteriorated, so that at the present time the said bonds, with the accumulated coupons of over two years, are selling at between twenty and thirty per cent. of their face value; and that, unless the road passes out of the hands of the receivers by a judicial sale at once, the said bonds will, by reason of the deterioration of the security, cease to have any value whatever.

Deponent is further informed, that on the examination of said railroad by an expert, it appears that an expenditure of a cash sum of upwards of $40,000 is almost immediately requisite to put the road and rolling stock in such a condition of repair as to protect it from ruinous depreciation; that he is informed and believes, that the receivers have no money whatever at present in their hands, except a small balance of about two thousand dollars, and that they have no means or authority to raise any larger sum; that their reports, as filed in the office of the Circuit Court of the United States, show that the current receipts of the road are not sufficient to enable them to expend any such sum; that he is informed and believes, and so avers, that if the said railroad shall remain for two years in the hands of receivers, without the expenditure of the said sum, its value will so far deteriorate as to take away all security whatever from the said first mortgage bondholders; that if the road be now exposed for sale, he believes that sufficient can be realized to pay a fair percentage of value on the first mortgage bonds, or if purchased by said bondholders they could, by a prompt expenditure of upwards of $40,000 in cash in repair, save the property from the ruin threatened; that from his personal knowledge of the condition of the said mortgaged property he declares that the sum of $1000 is totally insufficient to protect the first mortgage bondholders from damages caused by the delay incident to a hearing in the Supreme Court of the United States.

L. DU PONT.

Sworn to and subscribed before me, this second day of October, 1876.

CHARLES CARVER,
Notary Public.

[SEAL]

Kitchen, Appellant,

vs.

Randolph et al., *Appellees.*

AFFIDAVIT OF CHARLES BABER.

Charles Baber, being duly sworn, deposes and says:—That he is a party in interest in the above suit, being a first mortgage bondholder of the Wilmington and Reading Railroad Company, and having contributed to the expenses of the suit; that he and four other bondholders are attorneys in fact for owners of $1,087,400 worth of said bonds; that the said railroad extends from Birdsboro, in the State of Pennsylvania, to Wilmington, in the State of Delaware, and is about sixty-three miles in length; that for about eighteen months past it has been in the hands of receivers appointed by the Circuit Court; that during that period he is informed, that by reason of the impossibility of the receivers raising money for replacement of the road and rolling stock, the mortgaged property has largely deteriorated in value; that while faithfully discharging their duties to the utmost of their power, the receivers have been forced to use what current receipts have come to their hands in keeping up ordinary repairs; that at the present time an immediate cash expenditure of upwards of $40,000 is required to prevent a serious depreciation of the mortgaged property; that if it be now exposed for sale it will probably bring a fair price, but that if it be retained for two years in the hands of receivers, without the means or the power to make replacement, he does not think a purchaser can be found for it at any price, as the value will be gone by reason of decay; that under such circumstances, unless deponent and his

fellow-bondholders can look to the *supersedeas* bond a security, in case they receive the decision of the Supreme Court in their favor, they will have no remedy for the damage caused the mortgaged property by delay; that the sum of $1000 is totally inadequate to afford them protection in such an event.

CHARLES BABER.

Sworn and subscribed before me, this third day of October, A. D. 1876.

JOHN URIAN,
Alderman.

[SEAL]

Supreme Court of the United States.

OCTOBER TERM, 1876.

PAXSON KITCHEN, APPELLANT,

vs.

EDMUND D. RANDOLPH, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF OF APPELLANT ON MOTION FOR ORDER DIRECTING ADDITIONAL SECURITY ON SUPERSEDEAS BOND.

I.

The question of the *power* of the Court to review in this case the action of the Justice in respect to the amount of the security that ought to be required, is not decided by *Jerome* v. *McCarter*, (21 Wall., 28.)

In *Jerome* v. *McCarter*, the security was given within the sixty days allowed by the statute for a supersedeas as of *course*, and without the special leave or permission of a Justice of this Court.

In the present case the security was taken and the supersedeas awarded under that provision of the 1007th section of the Revised Statutes which empowers a Justice of this Court, where an appeal has been taken within sixty days from the decree, to extend the time for giving supersedeas security beyond the sixty days by special permission.

The proposition we desire to submit to the Court is, that the Court ought to exercise, and has power to exercise, a

more liberal jurisdiction in regard to the action of the judge where he proceeds under the special authority confered by the statute after the expiration of sixty days from the date of the decree, than in regard to his action under his *ordinary* authority touching the taking of security upon an appeal.

The provision of the 1007th section is, that a party who has taken an appeal within sixty days may give the security required by law "*afterward*, with the *permission* of a Justice or Judge of the Appellate Court."

We suppose there can be little doubt that, in a case in which the Judge has power to act under this provision, the *Court* may exercise the same power; and, if this be so, it would seem that the Court ought, upon an appropriate motion, to review the action of the Judge in such a case.

That this Court may exercise the power referred to, we think is clear, upon the doctrine of Chief Justice Marshall in *Bolman* v. *Swartwout*, (4 Cranch, 75,) where it was held that, under the provision of the act of 1789, which authorizes "*either* of the *Justices* of the Supreme Court" to grant writs of *habeas corpus*, the Supreme Court could award a *habeas corpus*.

"It would be strange," said Marshall, C. J., "if the Judge sitting on the bench should be unable to hear a motion for this writ, where it might be openly made and discussed, and might yet retire to his chamber and in private receive and decide upon the motion. This is not consistent with the genius of our legislation, nor with the course of our judicial proceedings."

The case is different where security is given *within* sixty days. Here the Court clearly has no power to act in the first instance.

If the Court, in a case where security is offered after sixty days, may act in the first instance, there would seem to be a manifest propriety in its taking cognizance of the action of one of its members after he has acted upon such a motion as this.

II.

Although the Court should decline to review the action of a Justice in a case where it appeared he had evidence before him at the time, touching the amount of the damages, yet it will determine the sufficiency of the security taken, where it appears that his attention was not *fairly* directed to the question of the damages by appropriate evidence.

In *Jerome* v. *McCarter* both parties appeared before the Justice and submitted proofs on the question of damages. (21 Wall., 19.) In this case it does not appear that the appellant gave *any* proof bearing on that question; and as the appellees had no notice of the application they could furnish no proofs. The amount fixed for the bond, which is probably not sufficient to secure the *costs*, would seem to indicate that there was no sufficient presentation made before the learned Justice of the important element of the indemnity for delay, and in such a case this court will certainly act in order to prevent a failure of justice.

III.

The affidavits now submitted show conclusively that if this property shall remain in its present situation for two or three years it will so far deteriorate as to cease to be any security at all, and that a purchaser will not be found for it at any price. It is quite probable that if these proofs had been submitted to the learned Justice he would have fixed the security at an amount not far from the amount to which we ask the bond to be increased, in case the court shall not vacate the order for a *supersedeas*, which, we submit, was made without authority under the 1007th section.

J. Hubley Ashton,
Lewis Waln Smith,
Of Counsel for Appellee.

Supreme Court of the United States.

OCTOBER TERM, 1876.

No. —.

PAXSON KITCHEN, APPELLANT,

vs.

EDMUND D. RANDOLPH, APPELLEE.

Now, to wit: October 9, 1876, comes Edmund D. Randolph, appellee, by his counsel, (appearing specially for the purpose of making this motion,) and moves this Honorable Court to vacate and set aside the order made on the 29th of September, 1876, by the Honorable Samuel F. Miller, one of the justices of this court, upon the petition of Paxson Kitchen, appellant, for a *supersedeas*, directing the stay of all proceedings in this case under the final decree therein rendered on the 6th of June, 1876.

And for specification of the ground of this his above motion the said Edmund D. Randolph says that it appears by the record in this case that no appeal was taken by the said Paxson Kitchen, or any other party, from the said final decree within sixty (60) days after rendering the same, and that therefore the said learned justice had no power or authority, under section 1007 of the Revised Statutes, to permit the said Paxson Kitchen to give the security required by law for a *supersedeas* directing the stay of proceedings under the said decree, or to allow or grant such *supersedeas*, after the expiration of sixty (60) days from the rendition of the said decree.

LEWIS WALN SMITH,
J. HUBLEY ASHTON,
Of Counsel for Appellee.

CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Edmund D. Randolph
vs.
The Wilmington and Reading Railroad Company *et al.*

Decree.

And now, June 6th, A. D. 1876, the above cause being heard on bill, answer, and replication, and having been argued by counsel for each of the parties thereto, and it appearing to the court that they have full jurisdiction to grant the relief prayed for in the said bill, it is finally ordered, adjudged, and decreed as follows:

1. That the mortgage in the bill of complaint mentioned, dated 3d March, 1868, and made by the Wilmington and Reading Railroad Company to George Richardson, Abraham Gibbons, and George Brooke, as trustees, is a first lien on the railroad of said company constructed between a point on the line of the Philadelphia and Reading railroad, at or near Birdsboro, in the county of Berks, in the State of Pennsylvania, and the city of Wilmington in the State of Delaware, and upon all the property and premises therein described, except upon the franchises possessed by said company under grants from the State of Delaware, and is effectual and binding thereon, and that the holders of the bonds secured by said mortgage are entitled to all the rights and securities thereby conferred, except as aforesaid.

2. That the said Wilmington and Reading Railroad Company did, on the 1st days of April and October, A. D. 1875, make default on the semi-annual interest on the bonds secured by said mortgage, and that notice being duly served on them according to the terms of said mortgage, the whole of the principal sum thereby secured, as well as the unpaid coupons, fell due and were payable on the 3d day of December, A. D. 1875.

3. That the Wilmington and Reading Company do, within five days, pay to Abraham Gibbons, George Brooke, and George Richardson, the trustees therein named, the amount due on the principal sum thereby secured, being one million two hundred and twelve thousand five hundred dollars, ($1,212,500,) with the several unpaid coupons at-

tached to said bonds, together with the interest which has thereon accrued since the several dates of their maturity.

4. That in default of such payment within the period named, the railroad of the said Wilmington and Reading Railroad Company, extending from a point on the line of the Philadelphia and Reading Railroad, at or near Birdsboro, in the county of Berks, in the State of Pennsylvania, to the city of Wilmington, in the State of Delaware, with all the rights, privileges, immunities, and franchises of the said Wilmington and Reading Railroad Company, under any and all grants of the State of Pennsylvania, together with the equipment thereof, consisting of all the locomotives, cars, and rolling stock belonging to said company, and also all rights of way and land occupied by or used in connection with or for the construction, completion, and maintenance of said railroad, with all the bridges, culverts, side tracks, depots, depot grounds, stations, machine shops, buildings, or other structures and improvements of every kind and description, acquired or erected or connected with said railroad, whether in the States of Pennsylvania or Delaware, conveyed by said mortgage to Abraham Gibbons, George Brooke, and George Richardson, trustees, be exposed to public vendue or outcry in one entire lot, in the city of Philadelphia, by the said Abraham Gibbons, George Brooke, and George Richardson, trustees, to whom all needful authority for that purpose is hereby given, after notice of the time, place, and conditions of sale, and of the property to be sold, has been given by advertisement in two daily papers in the city of Wilmington and the city of Philadelphia, and one paper in each of the counties of Berks and Chester, twice a week, if the said papers are so often published, for three months prior to the day of sale, (a copy of the form of such advertisement is annexed hereto.) The property shall be sold to the highest and best bidder upon his signing the conditions of sale, to wit: One hundred thousand dollars ($100,000) of the purchase-money shall be paid in cash when the property is struck off, and the balance within thirty days (30) after confirmation of sale by this court, provided that the said balance of the purchase-money may be either paid in cash or settled for by receipting to the said Abraham Gibbons, George Brooke, and George Richardson, trustees, for the dividend of the said balance of the purchase-money, which may appear to be payable on any of the bonds of the said railroad company, and matured coupons attached thereto, secured

by the mortgage of March 3d, 1868, which may be held by said purchaser or purchasers, and the delivery of the said bonds and coupons for said settlement shall be deemed equivalent to a cash payment to the extent of the dividend payable on each bond, and be a full acquittance and discharge of said purchaser or purchasers, and when the said purchase-money shall have been paid and receipted for, and the said sale confirmed by this court, upon the return thereof being made to the court, then the said Abraham Gibbons, George Brooke, and George Richardson shall execute and deliver to said purchaser or purchasers of said railroad, property, estates, premises, rolling stock, appurtenances, and franchises, except as aforesaid as above set forth, a good and sufficient deed or deeds granting and conveying the same to him or them in fee-simple. And the said purchasers shall thereupon take and hold the same free, clear, and discharged from all incumbrances subsequent to the lien of said mortgage and claim or demand of the Wilmington and Reading Railroad Company, or of any person claiming under them thereon or thereto, by way of equity of redemption or otherwise, and the said Wilmington and Reading Railroad Company, and all persons claiming under them, shall be thenceforth absolutely debarred and foreclosed of and from any such claim or demand whatsoever.

IN THE SUPREME COURT OF THE UNITED STATES.

Edmund D. Randolph,
A citizen of the State of New York, Complainant,
vs.
The Wilmington and Reading Railroad Company,
A corporation incorporated by the Commonwealth of Pennsylvania and the State of Delaware, and Paxson Kitchen, *et al.*, Defendants.

Appeal of Paxson Kitchen.

The appeal of Paxson Kitchen, one of the above-named defendants, appealing as well on his own behalf as on be-

half of all others, second mortgage bond holders of the said Wilmington and Reading Railroad, who may unite in the prosecution of this appeal, respectfully showeth: That on the fourth day of December, A. D. 1875, the above-named complainant filed his bill in the Circuit Court of the United States for the Eastern District of Pennsylvania against the defendant, the Wilmington and Reading Railroad, and others, for the purpose of obtaining a decree of foreclosure of a certain mortgage on the property of the said railroad, which was in said bill alleged to be a first incumbrance thereon.

That on the fourteenth day of March, A. D. 1876, the said Paxson Kitchen was, by order of the said Circuit Court, allowed to intervene and be made a party defendant in the said cause.

That answers having been filed by the said Kitchen and all the other defendants, and the cause having come on to be heard on said bill and answers, it was on the sixth day of June, A. D. 1876, finally ordered, adjudged, and decreed by the said Circuit Court as follows:

1. That the mortgage in said bill of complaint mentioned, and dated March 3, 1868, is the first lien on the track of the said company between a point on the line of the Philadelphia and Reading Railroad Company at or near Birdsboro, in the county of Berks, and State of Pennsylvania, and the city of Wilmington, in the State of Delaware, and upon all the property and franchises therein described, except upon the franchises possessed by said company under grant from the State of Delaware.

2. That the said Wilmington and Reading Railroad Company did make default in the payment of semi-annual interest on the bonds secured by said mortgage, and that due notice having been served on them the principal debt as well as the unpaid coupons fell due on December 3d, 1875.

3. That payment of said principal debt and unpaid coupons be made within five days from date of decree.

4. That in default of payment the track of said Railroad Company between the points named, and all the property and franchises appertaining thereto, except the said franchise in the State of Delaware, be sold.

And the second day of October, A. D. 1876, at 12 o'clock, M., at the Merchants' Exchange in Philadelphia, was designated as the time and place of said sale.

Therefore this appellant appeals from the whole of the

said decree of the said Circuit Court of the United States, and respectfully prays that the decree of the said Circuit Court, and the bill and answers, and all other proceedings in said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the said decree of the Circuit Court and every part thereof may be revised, and a decree made dismissing said bill with costs, or such other decree as to the said Supreme Court shall seem just.

GEO. TUCKER BISPHAM,
GEORGE F. BAER, [G. T. B.]
WAYNE MACVEAGH, [G. T. B.]

[Endorsed:]

In the Supreme Court of the United States.

Randolph *v.* Wilmington and Reading Railroad, *et al.*, with Paxson Kitchen.

Appeal of Paxson Kitchen.

Appeal.

Appeal allowed to operate as a *supersedeas*.
Washington, *Sept.* 29th, 1876.

SAM. F. MILLER.

Filed September 30, 1876. Circuit Court U. S., Eastern District of Pennsylvania. No. 41. October Session, 1875.

IN THE SUPREME COURT OF THE UNITED STATES.

Edmund D. Randolph, a citizen of the State of New York, Complainant. *vs.* The Wilmington and Reading Railroad Company, a corporation incorporated by the Commonwealth of Pennsylvania and the State of Delaware, and Paxson Kitchen *et al.*, Defendants.	Appeal from Circuit Court U. S. October Sessions, 1875. No. 41. In Equity.

Specifications of Appeal.

First. Because the court ordered a sale of property out-

side of the territorial limits of the jurisdiction of the State court.

Second. Because the court held and decreed that the lien of the first mortgage upon the said railroad did not extend to and include the franchise of the said corporation within the State of Delaware.

Third. Because the court held and decreed that the liens of the second mortgage did not extend to and include the franchises of the said corporation within the State of Delaware.

Fourth. Because the court held and decreed that the liens neither of the first nor of the second mortgages extended to and embraced a certain from Birdsboro to a point near Reading more particularly set forth.

Fifth. Because a sale was ordered by the said decree of a portion of the property of the said Wilmington and Reading Railroad without previously ascertaining the amount of incumbrances thereon.

Sixth. Because a sale was ordered by the terms of the said decree of a portion only of the property and franchises of the said Wilmington and Reading Railroad, the franchises of the said corporation in the State of Delaware and the branch road from Reading to Birdsboro not being included in the said decree.

[Endorsed:]

In the Supreme Court of the United States.

Randolph *v.* Wilmington and Reading Railroad *et al.* with Paxson Kitchen.

Appeal of Paxson Kitchen.

Specification of appeal.

Filed September 30, 1876.

[Endorsed on other side:]

Circuit Court U. S., Eastern District of Pa.

No. 41. October Session, 1875.

To the Honorable the Judges of the Supreme Court of the United States:

The petition of Paxson Kitchen respectfully showeth, that he is a holder of bonds secured by a certain trust deed or mortgage, made and executed by the Wilmington

and Reading Railroad Company, on the eighteenth day of March, one thousand eight hundred and seventy, to George Brooke, Abraham Gibbons, and George Richardson, trustees.

Your petitioner, as such bondholder, became, on March fourteenth, one thousand eight hundred and seventy-six, a party to a certain cause then pending in the United States Circuit Court for the eastern district of Pennsylvania, wherein Edmund D. Randolph was complainant, and the Wilmington and Reading Railroad Company and others were defendants, as will appear by reference to the records of the said court, whereof a copy is hereunto annexed.

By reference to the said record, it will also appear that it was so proceeded in the said cause that on June sixth, one thousand eight hundred and seventy-six, a decree was made and entered by the said Circuit Court, directing the foreclosure of the mortgage mentioned in the said pleadings, and ordering that a sale of a certain portion of the property of the said Wilmington and Reading Railroad Company should take place, as will more fully appear by reference to the terms of the decree, a copy of which is hereunto annexed.

The said Wilmington and Reading Railroad Company extends from the city of Reading, in the State of Pennsylvania, to the city of Wilmington, in the State of Delaware, and it has also control, by virtue of a certain lease or agreement, of a portion of the road of the Berks County Railroad Company, for the purpose of obtaining an entrance into the said city of Reading.

The said railroad is and has been operated as one continuous line or railway from Reading to Wilmington, under and by virtue of franchises granted to the said corporation by the States of Pennsylvania and Delaware respectively, and by virtue of legislation of the said States, creating and confirming the said grants, and of the lease or agreement before mentioned.

The acts of the respective Legislatures of Pennsylvania and Delaware will appear in the copy of the pleadings of the said cause herewith annexed and before referred to, and a copy of said lease or agreement with the said Berks County Railroad Company is also hereto annexed.

Your petitioner further shows to the court, that under the said decree and terms of the said order of sale, the trustees of the first and second mortgages named in the said pleadings, intended, on the second day of October,

one thousand eight hundred and seventy-six, at twelve o'clock noon, at the Merchants' Exchange, in the city of Philadelphia, to expose at public sale or outcry such portion of the railroad of the said Wilmington and Reading Railroad Company only, as extends from a point on the line of the Philadelphia and Reading Railroad, at or near Birdsboro, in the county of Berks, and the State of Pennsylvania, to the city of Wilmington, in the State of Delaware, with all rights, privileges, immunities, and franchises of the said Wilmington and Reading Railroad Company, under any and all grants from the State of Pennsylvania, but exclusive of the franchises granted by the State of Delaware, together with the equipments thereof.

Your petitioner represents, that the decree of the said Circuit Court, entered on the sixth day of June, one thousand eight hundred and seventy-six, is erroneous in several particulars, as set forth fully in certain specifications of appeal which have been filed and entered by this petitioner, and whereof a copy is hereunto annexed, and to which the petitioner craves leave to refer; and that an appeal from the said decree has been duly entered by your petitioner.

And your petitioner further shows to the court, that great and irreparable damage will be done to the interests of your petitioner and other bondholders if the sale ordered by the said decree should actually take place as is intended on October second, one thousand eight hundred and seventy-six, inasmuch as by the terms of the said sale, neither the franchises of the said corporation in the State of Delaware, nor that portion of its railroad which extends from Birdsboro to Reading, nor the lease or agreement before mentioned, will pass to the purchaser, and that a fragment only of the road of the said corporation will therefore be sold, and will not command as good a price and as advantageous terms as should and might be obtained if the same were sold as an entirety.

Your petitioner further shows that the time for filing the bond to operate as a *supersedeas* in the said appeal has passed by, unless by the special intervention and allowance of this court, the said time having been suffered to elapse by reason of the neglect of the trustees' defendants, the proper representatives of the bondholders, to appeal or otherwise protect the interests of their *cestuis que trusts*, and by reason of the great number of bondholders interested in the said mortgage, and the impossibility of obtaining at an earlier period concerted action among the same, and that therefore, unless a *supersedeas* is specially

allowed by your honorable court, your petitioners are without remedy in the premises.

Your petitioner therefore prays the allowance of an order for *supersedeas* to be issued from this court, and directing that the said sale and all other proceedings under and by virtue of the said decree be stayed and superseded pending the said appeal or until further order of this court upon the filing by your petitioner of such a bond, with such sureties and in such amount as to this court may seem proper. PAXSON KITCHEN. [SEAL.]

STATE OF NEW JERSEY, *Warren County.* } *Set:*

Paxson Kitchen, being duly sworn according to law, deposes and says that the facts set forth in above petition are true to the best of his knowledge and belief, and that the appeal taken in this case is not for the purpose of delay.

Sworn and subscribed before me this 26th day of September, A. D. 1876. LEWIS C. REESE, [SEAL.]
Notary Public.

[Endorsed:]

In the Supreme Court of the United States.

Randolph *v.* The Wilmington and Reading Railroad Company, Paxson Kitchen *et al.*

Appeal of Paxson Kitchen.

Petition for Supersedeas.

I allow the prayer of this petition upon the filing of the bond this day approved by me Sept. 29, 1879.

SAM. F. MILLER,
Asso. Justice Supreme Court U. S.

Filed September 30, 1876.

[Endorsed on other side:]

Circuit Court U. S., Eastern District of Pa.

No. 41. October Session, 1875.

Appeal from Circuit Court of the United States.

Randolph *vs.* Wilmington and Reading Railroad *et al.* } In Equity. Oct. Sessions, 1875. No. 41.

Know all men by these presents that we, Samuel Dickson and George F. Baer, are held and firmly bound unto the plaintiff above named (Edmund D. Randolph) in the

sum of one thousand dollars, lawful money of the United States, to which payment well and truly to be made we bind ourselves jointly and severally firmly by these presents.

Witness our hands and seals this 28th day of Sept., A. D. 1876.

The condition of this bond is that whereas Paxson Kitchen has taken an appeal from the decree of the Circuit Court of the United States for the Eastern District of Pennsylvania in the case above named to the Supreme Court of the U. S.: Now, if the said appellant shall prosecute his said appeal to effect, and if he fail to make his appeal good shall answer all damages and costs, then this obligation to become void, otherwise to remain in full force and virtue.

GEO. F. BAER, [SEAL.]
SAML. DICKSON, [SEAL.]

Signed, sealed, and delivered in presence of—

"Held and interlined before signing" in the case above named and interlined before signing—

SAM. F. MILLER.

I approve this bond, to operate as a *supersedeas*.

SAM. F. MILLER,
Asso. Justice Supreme Court.

September 29, 1876.

[Endorsed:]

No. 41. October Session 1875. Equity.
Randolph *vs.* Wilmington and Reading R. R. Co.
Supersedeas Bond.
Filed 30th September, 1876.

Circuit Court of the United States.

Randolph.	}	In Equity.
vs.		No. 41.
Wilmington and Reading R. R. Co.	}	Oct. Sess. 1875.

Charles Lear Gumbert, being duly sworn according to law, deposes and says that he served the citation in this case, hereunto annexed, on the complainant, Edmund D. Randolph, by leaving a true copy of the same at the office

of his counsel of record, Lewis Waln Smith, Esq., No. 707 Walnut street, in the city of Philadelphia, on Saturday, September 30, 1876, between the hours of 12 m. and 1 p. m., and that he served the said citation on the defendants, represented by George W. Biddle, Esq. and David W. Sellers, Esq., by handing a true copy of the same to the said George W. Biddle, Esq., personally, on Saturday, September 30, 1876, between the hours of 12 m. and 1 p. m.; and that he likewise served the said citation on the defendants, represented by Charles Hart, Esq. and Chapman Biddle, Esq., by handing a true copy of the same to the said Chapman Biddle, Esq., personally, on Saturday, September 30, 1876, between the hours of 12 m. and 1. p. m.

CHARLES LEAR GUMBERT.

Sworn and subscribed before me this thirtieth day of September, A. D. 1876. EDWARD S. HARLAN,
Notary Public.

THE UNITED STATES OF AMERICA.

To EDMUND D. RANDOLPH—*Greeting:*

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the 21 Monday of October next, pursuant to an appeal filed in the clerk's office of Circuit Court of the Third Circuit in and for the Eastern District of Pennsylvania, wherein Paxson Kitchen is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the defendants in the suit of Randolph against the Wilmington and Reading R. R. Co., as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. S. F. Miller, Asso. Justice of the S. C. of the U. S., this 29th September, 1876.

SAM. F. MILLER,
Asso. Jus. Sup. Court U. S.

[Endorsed:]

41. Oct. Sess., 1875.

Randolph *vs.* Wilmington and Reading Railroad *et al.*

C. C. U. S.

Citation and Affidavit of Service.

Filed September 30, 1876.

Supreme Court of the United States.

OCTOBER TERM, 1876.

No. —.

PAXSON KITCHEN, Appellant,

vs.

EDMUND D. RANDOLPH, Appellee.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Brief of Appellee on Motion to Vacate Supersedeas.

J. HUBLEY ASHTON,
LEWIS WALN SMITH,
Of Counsel for Appellee.

Supreme Court of the United States.

OCTOBER TERM, 1876.

No. —.

PAXSON KITCHEN, APPELLANT,

vs.

EDMUND D. RANDOLPH, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF OF APPELLEE ON MOTION TO VACATE AND SET ASIDE SUPERSEDEAS.

Statement.

This is a motion on behalf of Randolph, appellee, asking the Court to vacate and set aside an order made on the 29th of September, 1876, by his Honor, Mr. Justice Miller, granting a petition exhibited by Kitchen, appellant, for a supersedeas to be issued from this Court, directing a stay of all proceedings under a decree of the Court below, rendered on the 6th of June, 1876, foreclosing a mortgage on property of the Wilmington and Reading Railroad Company, and ordering a sale of the same.

The bill in this case was a bill for foreclosure and sale filed by Randolph, as holder of a large number of $1,250,000 coupon bonds of the Wilmington and Reading Railroad Company, secured by a certain deed of trust and

Supreme Court of the United States.

OCTOBER TERM, 1876.

No. —.

PAXSON KITCHEN, APPELLANT,

vs.

EDMUND D. RANDOLPH, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF OF APPELLEE ON MOTION TO VACATE AND SET ASIDE SUPERSEDEAS.

Statement.

This is a motion on behalf of Randolph, appellee, asking the Court to vacate and set aside an order made on the 29th of September, 1876, by his Honor, Mr. Justice Miller, granting a petition exhibited by Kitchen, appellant, for a supersedeas to be issued from this Court, directing a stay of all proceedings under a decree of the Court below, rendered on the 6th of June, 1876, foreclosing a mortgage on property of the Wilmington and Reading Railroad Company, and ordering a sale of the same.

The bill in this case was a bill for foreclosure and sale filed by Randolph, as holder of a large number of $1,250,000 coupon bonds of the Wilmington and Reading Railroad Company, secured by a certain deed of trust and

mortgage, against the railroad company, the trustees named in the deed, and two other junior mortgages, and the Baltimore, Philadelphia, and New York Railroad Company, as original defendants.

After the bill was filed one Paxson Kitchen, a bondholder under a junior mortgage of the Wilmington and Reading Railroad Company, was allowed to intervene as a defendant and file an answer.

The case was heard on the bill, the answers of the original defendants, and the answer of Kitchen; and on the 6th of June, 1876, the Court below entered a decree foreclosing the mortgage as against certain of the property and franchises covered by it, and ordering a sale by the trustees after due advertisements for three months prior to the day of sale.

The sale was accordingly fixed by due advertisements, as prescribed by the decree, for the 2d of October, 1876.

No appeal from this decree or any part of it was prayed in the Court below by any of the defendants.

On the 29th of September Kitchen made application to his Honor, Mr. Justice Miller, for an appeal, and, by petition addressed to this Court, for an order directing a *supersedeas* and stay of all proceedings under the decree of the Court below.

On the same day, the learned Justice allowed Kitchen an appeal, granted the prayer of his petition for a supersedeas, upon his filing a bond to secure costs and damages in $1,000, and directed that this bond should operate as a *supersedeas*.

A citation addressed to Randolph, complainant below, returnable on the first day of the present term of this Court, was signed the same day.

On the next day, September 30, the appeal and allowance, the petition for a *supersedeas* and order thereon, the

supersedeas bond for $1,000, and the citation, with affidavits of service, were lodged in the office of the clerk of the Court below.

The necessary effect of these proceedings (which appear in the copy of the record annexed to the motion) was to postpone the sale advertised for the 2d of October.

As the consequences of delay, in view of the deterioration of the property, will be very serious, the parties interested in the execution of the decree have brought before the Court, by the present motion, the question of the power of the Court, or one of the Justices of the Court, in a case where no *appeal* was duly taken *within* sixty days from the rendition of the decree, to allow a supersedeas after the expiration of sixty days from the rendition of the decree.

The final decree in this case, as has been seen, was rendered on the 6th of June. The appeal and *supersedeas* were granted on the 29th of September. No appeal was taken within sixty days from the entry of the decree.

The proposition we submit to the Court by this motion is, that inasmuch as the party took no appeal from the decree complained of within sixty days from the time it was rendered, there was no power to award him a *supersedeas* after the expiration of that period.

Argument.

1. A very few words will be needed, we think, to make this proposition clear to the Court. The matter is governed by the following provisions of section 1007 of the Revised Statutes:

"In any case where a writ of error may be a supersedeas, the defendant may obtain such supersedeas *by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of*, and giving the security required by law

on the issuing of the citation. But if he desires to stay process on the judgment, he may, *having served his writ of error as aforesaid*, give the security required by law within sixty days after the rendition of such judgment, or afterward with the permission of a justice or judge of the Appellate Court."

In regard to appeals from the Circuit Court, section 1012 provides as follows:

Sec. 1012. Appeals from the Circuit Courts shall be subject to the same rules, regulations, and restrictions as are or may be prescribed in law in cases of writs of error.

By multitudinous decisions of this Court, where an appeal is the proper method of bringing into action its appellate jurisdiction, the proper application for an appeal and its due allowance, and the issuing and service of a citation when necessary, are of equivalent legal effect to the service of a writ of error in cases at law. (Barrel *v.* Transportation Co., 3 Wall., 424; Pierce *v.* Cox, 9 Wall., 787; Rodd *v.* Hart, 17 Wall., 354.)

The words of sec. 1007, therefore, must be read, in their application to cases in equity, in the light of the decisions of this Court as to appeals, and their relation to its appellate jurisdiction.

The section would appear to declare in the plainest words —words which would only be obscured by attempted elucidation—that to authorize a justice or judge of the Appellate Court to award a supersedeas after sixty days have expired from the rendition of the judgment, the party must have sued out his writ of error and served it *within sixty days after the rendering the judgment complained of.*

The words are, " but if he desires to stay process on the judgment, he may, having served his writ of error *as aforeaid*, give the security required by law within sixty days after the rendition of such judgment, or *afterward with the permission of a justice or judge of the Appellate Court.*"

The provision, then, is, that to authorize a judge of the Appellate Court to accept security and issue a supersedeas, after sixty days from the rendition of the judgment, the party must have "served his writ of error *as aforesaid;*" that is to say, he must have "served his writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of."

The words "*as aforesaid*" necessarily refer, not to a *part* of the steps "aforesaid," but to *all* of them equally.

The provision may be written out, therefore, as follows:

"But if he desires to stay process on the judgment he may, having served his writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of, give the security required by law within sixty days after the rendition of such judgment, or afterward with the permission of a justice or judge of the Appellate Court."

If he has not complied with this prerequisite—if he has not taken out and served his writ of error within 60 days from the judgment—no appellate judge can grant him permission to give supersedeas security and award him a supersedeas afterward, *i. e.*, after the expiration of sixty days from the rendition of the judgment.

We respectfully submit that there is no room or occasion for construction in this act. It is, on the main question, as clear, definite, and precise as English words can make it.

The discretionary authority conferred on the judge of the Appellate Court is simply to allow a party, who has taken and served a writ of error within sixty days from the rendition of the judgment, to give supersedeas security after the expiration of that period, and to award him a supersedeas. The judge is authorized after sixty days, where the circumstances of the case, in his opinion, justifies it, to accept

security and issue a supersedeas, *provided*, however, the party has issued and served a writ of error within sixty days from the entry of the judgment. This is a condition he must have fulfilled to entitle the appellate judge to grant him a stay of proceedings after the expiration of the period of sixty days from the judgment. The judge cannot dispense with this requirement, or give a party who has not fulfilled it the benefit of a supersedeas. All the judge is authorized or permitted to determine is whether, under the circumstances of the case, a party, who has sued out a writ of error within sixty days from the judgment, ought to be allowed to give supersedea security after that period, and the proper amount of the security. But the party making an application for such indulgence is bound to show that he has done what is necessary to invoke the appellate jurisdiction, and that he did it within sixty days from the judgment.

In a case in equity the appeal, duly prayed and allowed, represents the writ of error; so that, in such a case, a party, who has not given security for a supersedeas within sixty days from the date of the decree, may be permitted to give such security after that period, *in case, but only in case, he has duly taken an appeal within that period.*

He may, of course, have an *appeal* after sixty days, and within the two years limited for an appeal; but a *supersedeas* he cannot have *after* sixty days from the date of the decree, unless he has duly appealed *within* sixty days from that date.

If he has not seen fit to invoke the appellate jurisdiction within sixty days from the decree of which he purports to complain, he cannot afterwards be permitted to stay the processes of justice while the case is pending in the Appellate Court. Nor would it be reasonable or just that he should be permitted to do so. A losing party can always sue out a writ of error or take an appeal within two months from the decision of the case, and he always *will*, where he is

acting in good faith in attempting to tie the hands of the Court by a supersedeas, and is not proposing to speculate on the delays, the necessities of the other side, or the possible chances of litigation in an appellate tribunal. It is possible, however, that such a party may not always be able to get adequate security within two months; and, in that case, or under other special circumstances, if he has taken his appeal within that period, it may be proper enough to allow him (and the act does allow him by permission of a judge of this Court) to give security and obtain a supersedeas afterward. But there is no reason why a party who has folded his arms for two months should be afforded an opportunity at any time within two years not only to remove the case from the Court which has decided, but also to tie its hands completely while the case is pending in the Appellate Court.

No case could efford a better illustration than this of the evil of a system which would give a losing party two years to obtain a supersedeas. We suppose no proper excuse could be given for the failure of this appellant to take an appeal within two months from the time this decree was entered. He allows, however, not only two months but nearly four months to elapse before he does anything toward bringing the case up; and in the meantime the expenses incident to a sale of the property are incurred, and the parties make their arrangements to protect their interests in the subject of litigation; and, on the eve of the execution of the decree, he takes the first step to obtain a review of that decree, and then applies for a stay of all further proceedings under it. It must be obvious that if he were taking these measures in good faith he would have taken them long ago, before anything of serious moment had been done on the faith of the decree.

2. The provision of the 11th section of the act of 1872, under which the case of *The Telegraph Company* v. *Eyser*, (19 Wall., 419,) was decided, differs materially from that

of section 1007, upon which this case is to be determined. All that the Court decided, however, in *Eyser's* case was, that the lodging of a copy of the writ of error in the clerk's office within *ten days*, as required by the act of 1789, was not an indispensible prerequisite to obtaining a supersedeas, upon giving security within sixty days after the rendition of the judgment, under the authority of the act of 1872.

The Court did not there decide (as we understand the case) that under the act of 1872 a supersedeas could be allowed by an appellate judge *after* the expiration of sixty days from the judgment, in a case where no writ of error had been served *within* that period. It was not necessary for the Court to affirm such a proposition. It would have been *obiter* to say so, for in *Eyser's* case the writ of error was served and the security was given *within* sixty days from the date of the judgment.

All the court determined is thus clearly stated by Mr. Justice Swayne: "A construction," he says, "which requires the service to be still within *ten* days from the rendering of the judgment is, we think, too narrow." (19 Wall., 428.)

But, as we have said, the section of the Revised Statutes under consideration, passed after the act of 1872, differs essentially from the 11th section of that act. The Revised Statutes expressly require that a writ of error shall have been served, or that an appeal shall have been taken, within sixty days after the rendition of the judgment or decree, in order to entitle the appealing party to give security for a supersedeas, with the permission of a judge of the Appellate Court, after the expiration of that period. The act of 1872 was silent as to the writ and the appeal. It did not say when the writ should be served or when the appeal should be taken. The Revised Statutes (sec. 1007) supply that deficiency, and provide that the writ of error shall be served, or the appeal shall be duly taken, within the period of sixty days from the judgment or decree, to warrant the allowance of a supersedeas,

upon the party giving the requisite security, after that period has expired.

We think the words of the 1007th section clearly show that it was the intention of the framers of the Revised Statutes to require in *every* case a party to sue out and serve a writ of error, or duly take an appeal, within sixty days from the entry of the judgment or decree, in order to entitle him to a stay of proceedings under it; and we have reason to believe, independently of the words of the 1007th section, that this was in fact the intention of the Committee on the Revision of the Laws who framed that section. We are happy to know that the learned justice, who granted the order in this case which is here reviewed, is desirous that the question shall be determined by the Court, and we believe that if he should be convinced that the construction of the act we submit to the Court is the correct one. no member of the Court will be more ready than he to remedy the matter of this supersedeas.

J. HUBLEY ASHTON,
LEWIS WALN SMITH,
Of Counsel for Appellee, Randolph.

No. *October Term, 1876.*

Supreme Court of the United States.

KITCHEN, Appellant,

vs.

RANDOLPH, Appellee.

BRIEF ON MOTION TO VACATE SUPERSEDEAS.

GEORGE F. BAER,
SAM'L DICKSON,
WAYNE MAC VEAGH,
For Appellant.

Allen, Lane & Scott's Printing House, 233 South Fifth Street, Philadelphia.

In the Supreme Court of the United States.

Paxson Kitchen, Appellant,

vs.

Edmund D. Randolph, Appellee.

October Term, 1876.

No.

Sur APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF OF APPELLANT ON MOTION TO VACATE AND SET ASIDE *SUPERSEDEAS.*

The statement of the case made by the counsel for the appellee is substantially correct, and the only question to be considered in the argument of this motion is whether a *supersedeas* can be granted by a justice or judge of the appellate court, in a case where the appeal has not been served, within sixty days from the rendition of the decree.

ARGUMENT.

By the twenty-third section of the judiciary act of 1789 it was enacted as follows:—"A writ of error as aforesaid shall be a *supersedeas*, and stay execution in cases only where the writ of error is served, by a copy thereof being lodged for the adverse party in the clerk's office where the record remains, within ten

days, Sundays exclusive, after rendering the judgment or passing the decree complained of. Until the expiration of which term of ten days executions shall not issue in any case where a writ of error may be a *supersedeas*, and where, upon such writ of error, the supreme or a circuit court shall affirm a judgment or decree, they shall adjudge or decree to the respondent in error just damages for his delay, and single or double costs at their discretion."

The act of 3d March, 1803, provides that "appeals shall be subject to the same rules, regulations, and restrictions as are prescribed in law in cases of writs of error."

The opinion in the case of Hardeman *vs.* Anderson, 4 How., 640, states that this court had power, to issue a writ of *supersedeas* where the writ of error had not been filed within the ten days (under the fourteenth section of the Judiciary Act); but in Hogan *vs.* Ross, 11 *id.*, 294, and Adams *vs.* Low, 16 *id.*, 148, the existence of this power was denied and the previous case was explained upon the ground that the writ had been really lodged within the time prescribed. In *Ex parte* The Milwaukee Railroad, 5 Wallace, 188, however, Hardeman *vs.* Anderson is cited with approval, and a writ of *supersedeas* was awarded upon its authority, the security offered by the appellant in that case to the district judge having been rejected by him, without sufficient cause.

By the eleventh section of the act of June 1st, 1872, entitled "An act to further the administration of justice," it was thus enacted:—"Any party or person desiring to have any judgment, decree, or order of any district or circuit court reviewed on writ of error or appeal and to stay proceedings thereon during the pendency of such writ of error or appeal, may give the security required by law therefor within sixty days after the rendition of such judgment, decree, or order, or afterward with the permission of a justice or judge of the said appellate court.

The language of the section was the subject of consideration in the recent case of Telegraph Company *vs.* Eyser, 19 Wallace, 419, and it was held that it was no longer necessary that the writ of error should be sued out within ten days after the

rendition of the judgment, and consequently that a plaintiff in error was in time, who had taken out his writ and filed his bond in the office of the clerk, twenty-eight days after the judgment was rendered. Such being the state of law, by section 1007 of the Revised Statutes, it was thus enacted:—

"In any case where a writ of error may be a *supersedeas*, the defendant may obtain such *supersedeas* by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office, where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. But if he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judgment, or afterward with the permission of a justice or judge of the appellate court. And in such cases where a writ of error may be a *supersedeas*, executions shall not issue until the expiration of the said term of sixty days."

And finally, by the act of 18th February, 1875 (18 Stats., 318) this section is amended by striking out in the last line "the said term of sixty days," and inserting the word "ten."

To ascertain the meaning of "this confused and awkwardly-constructed section," as it is styled by Mr. Phillips (Practice, page 123, ed. 1876), regard must be had to the law as it was understood and enforced at the time of its passage. The declared object of Congress was to codify the existing statutes, without altering their meaning and effect. It is not merely such a presumption as has led to the adoption of the familiar rule that "Statutes are to be construed in reference to the principles of the common law: for it is not to be presumed that the legislature intended to make any innovation upon the common law further than the case absolutely required" (1 Kent, 464*); but there is the express declaration of the legislative intent.

By the provisions of the first section of the act of June 27th, 1866 (14 Stats., 74), the commissioners were appointed "to revise, simplify, arrange, and consolidate all statutes of the United States, general and permanent in their nature, which should

[shall] be in force at the time such commissioners might [may] make the final report of their doings;" and by the second section they were directed to "bring together all statutes or parts of statutes which, from similarity of subject, ought to be brought together, omitting redundant or obsolete enactments, and making such alterations as may be necessary to reconcile the contradictions, supply the omissions, and amend the imperfections of the original text."

This was the scope of their power. They were to "amend the imperfections of the original text," and although where the new law plainly differs from the old it is an implied repeal of the latter (Murdoch *vs.* City of Memphis, 20 Wallace, 590, 617), yet clearly the presumption is against any repeal having been intended.

It is also to be borne in mind, in approaching the consideration of this section, that it has been settled by this court that it is to be liberally construed as a remedial statute. In the case of Telegraph Company *vs.* Eyser, *ut supra*, only three years ago, it was said, in reference to the eleventh section of the act of June 1st, 1872:—

"These provisions are remedial, and, therefore, to be construed liberally. So far as there is any conflict with the pre-existing rules the latter must yield. The intention of the law-maker constitutes the law. What is clearly implied in a statute is as effectual as what is expressed. It is expressly declared that the *supersedeas* bond may be executed within sixty days after the rendition of the judgment, and later with the permission of the designated judge. It is not said when the writ of error shall be served. Its issuance must, of course, precede the execution of the bond; and, as the judge who signs the citation is still required to take the bond, we think it is sufficiently implied that it may be served at any time before or simultaneously with the filing of the bond. Indeed, the giving of the bond alone is made the condition of the stay. The section is silent as to the writ. A construction which requires the service to be still within ten days from the rendering of the judgment is, we think, too narrow. It is sustained by no sufficient reason, and would

largely defeat the salutary purposes of the statute. The execution, approval, and filing of the bond are substantial. The filing of the writ is matter of form. Form, under the circumstances, must not be allowed to defeat substance, where the consequences would be of so serious a character. The application of the plaintiff in error is founded upon this section. As we construe it, their case is within it. The order asked for will be directed to issue, unless this opinion shall render that procedure unnecessary."

Considered in the light of these principles, the true meaning of section 1007 would be plain, though couched in language still more obscure; but, in fact, the strict grammatical construction of the controlling clause—*having served his writ as aforesaid*—does not sustain the view maintained by the opposing counsel. How "served as aforesaid"? Obviously, in the manner specially prescribed, "by lodging a copy thereof for the adverse party in the clerk's office." A service like this, which is made the substitute for personal notice, could only be made good by explicit language, and as there could be no stay till the record was removed, it was still necessary to re-enact the provision as to the service in cases occurring after the expiration of the period within which, counsel might be supposed to be keeping watch upon the record. To express this thought no language could be more appropriate than that selected,—"having served his writ as aforesaid," that is to say, in the manner said or prescribed before, in the preceding clause. No better test can be applied in the criticism of a sentence than to suppose one's self in the position of the draftsman of the statute and called upon to express the conflicting meanings imputed to it. If asked to frame a provision which was to introduce a change in the law as it then existed, by restricting the time within which the writ of error was to be taken—for in effect it was decided in Telegraph Company *vs.* Eyser that the writ of error could be taken after the sixty days had elapsed, as that limit was first mentioned in the act of 1872, and if the restriction for the filing to ten days, as prescribed in the act of 1789, was no longer operative, there was no restriction at all—it is hardly conceivable that express mention would not have

been made of both the time and manner of service. On the other hand, the taking out of the writ being a condition precedent to the vesting of jurisdiction at all, it was essential to the proper statement of the thought, that allusion should be made to that, even though it was the purpose to leave the time of doing it a matter of judicial discretion, and no briefer or more purely incidental mention could be made than by the use of the phrase employed. It will also be observed that no provision is made for the service of the writ in any of the statutes, except where it is to be made a *supersedeas*. In other cases notice is to be given by a citation, which, too, may be waived, or in certain cases be treated as superfluous—whereas, to procure a stay, the taking out of the writ and the service in the manner prescribed are both indispensable prerequisites.

It is believed, therefore, that if the clause were to be read as the schoolmaster would read it, the sentence would still be taken to mean that if the defendant shall have served his writ of error, in the manner aforesaid, he may give the security at any time, with the permission of a justice of an appellate court.

But statutes are not so interpreted. The policy of the law and the reason of the law are taken into account; and here no good reason can be given why, if it be important to vest the discretion in the appellate tribunal to relieve from a forfeiture of right by mere efflux of time, the exercise of such power should be made contingent upon a pure formality. It cannot be requisite to guard against misapprehension by saying that it is not intended to question the necessity of having the time fixed within which, in ordinary cases, the execution of a judgment is to be stayed; but it is the stay which is the matter of substance, and if that can be granted at any time afterward, no reason can be urged against the suing out the writ of error at the same time, which is not equally valid against the *supersedeas* itself. *Ex concessu* the indulgence can only be obtained in the exceptional case and "*by permission.*" Till the sixty days have expired, the writ and the delay are of right, and it has been necessary to impose penalties where the court is of opinion that delay, and not the redress of error, was the object sought; but where a

special *allocatur* must be had, there is an assurance given, at the outset, that the *laches* of the suitor has been explained, and that there is a substantial question involved worthy of the consideration of the appellate court.

Without enlarging, it need only be added that this was the view of the law taken by Mr. Justice Miller in the well-considered case of The Farmers' Loan and Trust Company *vs.* The Central Railroad Company of Iowa,—copies of his opinion being submitted as part of this argument,—and that this case illustrates the propriety of having such a dispensing power in the hands of the members of this court. The appellant is one of a class, and *laches* which would bar an individual standing by himself will not bar a class: Whichcote *vs.* Lawrence, 3 Vesey, 750; Company of Undertakers *vs.* Mackenzie, 8 Bro. P. C., 42 and the questions involved relate to proceedings of foreclosure of a corporation mortgage, covering property in two States, which are so far unsettled that no counsel can undertake to advise his clients, what title, or what sort of a title, or what property will pass by the decree appealed from.

GEORGE F. BAER,
SAM'L DICKSON,
WAYNE MacVEAGH,
For Appellant.

OPINION OF MR. JUSTICE MILLER

IN THE

FARMERS' LOAN AND TRUST COMPANY *VS.* THE CENTRAL RAILROAD COMPANY OF IOWA.

In the matter of the application to me, at chambers, to set aside the order heretofore made by me, allowing an appeal to operate as a *supersedeas*, after a full hearing and mature consideration I overrule the motion.

1. The only ground which goes to the merits on which the motion is founded, is, that the sum of $20,000, the amount of the bond approved, is entirely too small to justify a *supersedeas*. Of the sufficiency of the bond as to amount I have no doubt. The whole of this subject was reviewed in the case of Jerome *vs.* McCarter, 21 Wall., 17. The spirit of that decision and the intent of all the statutes on the subject is, that in case of a foreclosure of a mortgage or of any judgment for the sale of the property, where that is the principal matter, the bond necessary to appeal, with *supersedeas*, shall be sufficient to secure costs of suit and such loss by delay as might be reasonably anticipated. Interest on the debt is not the only criterion, for the debt may be ten times the value of the property; and when the plaintiff could only get the property and no more, under this decree, the true criterion is such rent or net proceeds for the use of the property as would fairly accrue to plaintiff, pending the litigation. This is already secured by plaintiff in this case, by the fact that this road is in the hands of the court by its receiver, and all it earns pending the appeal, above its necessary expenses,

will go to plaintiff on the debt and interest coupons. I am reminded that Judges Dillon and Love, who granted the first appeal, required a bond of $1,000,000. They may be of a different opinion from mine as to what would be the measure of damages on such a bond, and no doubt they thought such a bond necessary; but with my views of the matter I am very clear that $20,000 is sufficient, and if I had any right to act in the matter at all, I am quite satisfied with that action.

2. It is argued that I had no such authority; that the judges of the Circuit Court having in open court allowed the parties non-appealing to be made parties, for the purpose of taking an appeal, and having allowed an appeal on condition of giving bond for $1,000,000, within thirty days, to operate as a *supersedeas*, otherwise in the sum of $2000, their order is conclusive.

Considering that the appeal thus granted expired *or became functus officio*, because *no* bond was given within thirty days, I granted another appeal after the expiration of this time, fixing the bond at $20,000, to operate as a *supersedeas*. This, I suppose, I had the right to do under sections 1007 and 1012 of the revised statutes. If the appeal granted by the judges in open court has expired, I am of opinion that I had the power to do this, and that it was my duty to do it.

But suppose that appeal was still valid, but the right to stay the execution of the decree, by giving the bond for $1,000,000, was gone by expiration of the thirty days, as it certainly was, I am still of opinion that as there was an appeal in existence, but the thirty days allowed by the order of the court, and the sixty days allowed by the statutes for filing a *supersedeas* bond, had expired, there was a right, under section 1007, in a judge of the Supreme Court, to accept a bond to operate as a *supersedeas*, on application to him after the sixty days had expired.

If I have been in error in this, I very much doubt my power to set aside the appeal I have granted on the *supersedeas* which I have ordered. It would be a very dangerous doctrine to hold, that an appeal once allowed, or a stay once ordered on an appeal, is always under the control of the judge who allows it.

The case is, after a valid appeal, pending in the Supreme Court, and if their is no valid appeal that court will dismiss it, and let the party proceed to enforce his decree. It is a satisfaction to me that, as the Supreme Court has decided that an appellee need not wait until the record is filed, nor even until the term to which the appeal is returnable, to apply for a dismissal of the appeal, the appellees, in this case, can, by a motion to that court, correct my mistake if I have acted without authority. *Ex parte* Russell, 13 Wall., 664.

March 10th, 1876.

In the Supreme Court of the United States.

Randolph

vs.

The Wilmington and Reading Railroad et al.

APPEAL OF PAXSON KITCHEN.

Paxson Kitchen, being duly sworn according to law, deposes and says as follows:—

First.—The above-named appellant, Paxson Kitchen, and other parties in interest, on whose behalf the said appeal has been taken, are bondholders of the Wilmington and Reading Railroad to the extent of over $700,000, said bonds being secured by a second mortgage upon all the property of the said railroad, including, as this deponent is advised and therefore avers, the entire road, with its branches, and the franchises of the said corporation, both in Delaware and Pennsylvania. The total amount of bonds secured by the said mortgage is $1,750,000.

In addition to this incumbrance there is also a first mortgage, to foreclose which the proceedings in this case were instituted, and a certain mortgage on a branch road of the said corporation running from Birdsboro to Reading.

The lien of this last-mentioned mortgage, however, is, as this deponent is advised, subsequent to the lien of the said second mortgage.

This deponent is not informed with certainty as to the amount actually due upon the said first mortgage and upon the said

mortgage upon the branch road, as these amounts have never been judicially ascertained.

This failure to ascertain judicially the amounts actually due upon the said incumbrances is one of the grounds upon which this appeal has been taken, and upon which, as this deponent is advised, the decree of the court below will be reversed or corrected. In addition to the above-mentioned mortgages, the said corporation had, before any of the litigation hereinafter mentioned was begun, a large floating indebtedness amounting to between $300,000 and $400,000. Notwithstanding the incumbrances upon the property of the said corporation and the amount of its floating indebtedness, this deponent believes and avers that the said railroad, unless improperly sacrificed, would be sufficient to pay the principal and interest of the said first mortgage and a very considerable portion, if not all, of the amount due upon the second mortgage; but that such a result cannot be attained if the assets of the corporation are improperly applied to unsecured claims in violation of the proper order of priority of the corporate debts, or if the property of the said road is by judicial sale or otherwise disposed of at a sacrifice.

Second.—For the purpose of protecting their own interests and those of their fellow-bondholders, this deponent, and others acting with him, have been compelled to take various legal steps, the principal of which are as follows:—

(*a.*) It was discovered that a portion of the rolling stock and other assets of the corporation, which were bound by the lien of the second mortgage above mentioned, were being improperly used for the purpose of liquidating a portion of the floating indebtedness of the railroad, and that the said corporate property was liable to be taken in execution and sold at sheriff's sale; whereas a portion only of the said road could be exposed to sale, and the interests of incumbrancers upon the whole road thereby greatly injured. To prevent this threatened injury, a bill was filed in the Circuit Court of the United States for the Eastern District of Pennsylvania, to No. 40, April sessions,

1875, entitled Hancock *vs.* The Wilmington and Reading Railroad, wherein the threatened executions were asked to be restrained, and a receiver of the road was applied for. These prayers of the bill were granted.

The trustees under the mortgages, Messrs. Brooke, Gibbons, and Richardson, were appointed receivers of the road. Since the date of these appointments the road has been under their management, and has been conducted in such a way as not in the slightest degree to impair the security of the first mortgage. On the contrary, this deponent believes and avers, that the said receivers have managed the said road very much in the interests of the first mortgage bondholders, and to the detriment of the interests of this deponent and others of the second mortgage bondholders.

(*b.*) Default having been made in the payment of coupons on the second mortgage, a bill was filed in the said court by the said Hancock against the Wilmington and Reading Railroad, to October sessions, 1875, No. , for the purpose of obtaining a decree of foreclosure of the second mortgage.

(*c.*) A bill in equity having been filed in the said court to October sessions, 1875, No. 41, by one Randolph, an alleged first mortgage bondholder, on behalf of himself and other like bondholders, against the said railroad, wherein and whereby a decree for a foreclosure of the first mortgage and a sale of the railroad was prayed, but to which proceedings the second mortgage bondholders were not made parties, it was deemed proper to present a petition to the said court, on behalf of the second mortgage bondholders, for leave to intervene in the said suit for the purpose of protecting their interests. Such a petition was accordingly presented by appellant, and on March 14th, 1876, the court granted the prayer of the same and allowed the petitioner to intervene. An answer was subsequently filed by the said petitioner to the above-mentioned bill.

All of the above steps will appear by reference to the records of the several cases mentioned above as they now appear in the

said Circuit Court of the United States. To these records this deponent craves leave to refer.

Third.—The said railroad cost to build and equip upwards of three millions of dollars in cash, and if the sale be postponed until the present revival of business has proceeded to a further appreciation of values, and has resulted in a further increase in the earnings of railroads, this deponent believes and avers, that the said road could be run at a profit sufficient to pay the interest on the entire mortgage debt and on the floating indebtedness, and if sold would realize at least two millions of dollars.

Fourth.—This deponent believes and avers and shows to the court, that the interests of this deponent and of the other second mortgage bondholders will be greatly impaired, if not entirely ruined, by the decree of the Circuit Court entered in this case, and from which this present appeal is taken, and by a sale in accordance with the terms of said decree. And this deponent further believes and avers, that the interests of the complainant in the said cause, and of the other first mortgage bondholders, will not be in any way imperilled by a postponement of the said sale and by suffering the property of the said road to remain in the custody of the court (as it now is) pending the proceedings on appeal. On the contrary, this deponent is informed and believes that a majority of the first mortgage bondholders have united in an agreement for the purchase of the road under the decree of the Circuit Court, and that as to those so uniting the condition of the road would not be more secure after the sale than it now is, and as to those who are not become parties to the agreement, their interests will be promoted by a delay which will assuredly result in the obtaining of a larger price for the property than it would now realize. The accounts filed by the receivers show that they have been able to retain each month a considerable sum out of the gross earnings of the road, and that they now have on hand some thousands of dollars to be appropriated, if necessary, to repairs or other extraordinary expenses.

It is greatly to the advantage of all the bondholders, and

especially to those of the bonds secured by the second mortgage, that the said road, which is and has been operated as one continuous railway from Reading to Wilmington, under and by virtue of franchises granted to the said corporation by the States of Delaware and Pennsylvania respectively, and by virtue of legislation of the said States, in reference to said grants, should be sold as an entirety. And this deponent further avers that such a sale could be readily secured, as the branch road before mentioned is, as this deponent is advised, in point of law embraced by the terms of the said second mortgage and should therefore be included in any decree for a sale of the said road, and as legislation by the State of Delaware, if any is necessary, for the purpose of conferring the franchise granted by that State upon any purchaser or purchasers at a public sale of the said road, could be secured with little trouble and with very little delay.

But this deponent shows to the court that by the terms of the said decree in the said cause appealed from, a portion only of the said road will be sold, as by the terms of the order of sale under decree the branch road above mentioned and the franchises of the road granted by the State of Delaware are not included in the sale.

By this method of selling the road in fragments, a far less price will be realized than if the property was sold as an entirety.

Fifth.—This deponent further avers that the trustees under the three mortgages above mentioned are the same, and that they are also receivers of the said road; that it is their duty as such trustees and as such receivers to have regard for the interests of this deponent and other second mortgage bondholders, as well as the interests of prior incumbrancers; but that they have disregarded their duty in this behalf and have not sufficiently protected the interests of the second mortgage bondholders. The said trustees have been notified to appeal from the decree of the said court, and the injurious effects of the said decree, if executed as it now stands, have been carefully pointed out to

them. They have declined and refused and still do decline and refuse to take an appeal or to take any other steps whatever to secure a more advantageous disposition of the property.

Sixth.—This deponent further shows, that for the purpose of effecting an advantageous sale of the property of the said road as an entirety, auxiliary proceedings should be taken in the proper courts of Delaware. He is advised that the Circuit Court of the United States for the Eastern District of Pennsylvania has no jurisdiction to decree a sale of that portion of the road which lies outside the territorial limits of the State of Pennsylvania, and that for this, as well as for the reasons above mentioned, competition at a public sale will be lessened and the price of the said road greatly depreciated for want of ability on the part of the vendors to confer a marketable title on the purchaser.

Seventh.—This deponent shows that by no possibility can the interests of the first mortgage bondholders be in any way injured by the delay which will be necessary for the purpose of taking the auxiliary proceedings above mentioned by the sale of the branch road, and for the obtaining the necessary legislation in the State of Delaware, inasmuch as the whole of the said road is now in the custody of the court, and is being managed under the court's supervision and control.

This deponent is informed and believes that the current earnings of the said road are more than sufficent to pay the running expenses, and that these earnings will shortly be greatly increased with the expected revival of business.

Eighth.—This deponent further shows to the court that the decree in this case was entered on June 6th, 1876. The bondholders secured by the second mortgage are very numerous, and owing to the usual summer vacation it was impossible to confer together for the purpose of deciding upon the appeal. Moreover, it was deemed not improper that the bondholders should wait before taking any decided steps, as it was presumed that the trustees, who were bound to protect their interests, would

enter an appeal. A short time before the date for which the sale was advertised to take place, no appeal having been entered by the trustees, arrangements were made as speedily as possible by the second mortgage bondholders to enter and perfect such an appeal.

PAXSON KITCHEN.

Sworn and subscribed before me, this seventh day of October, A. D. 1876.

ALEXANDER RAMSEY,
Notary Public.

[SEAL]

Supreme Court of the United States.

Paxson Kitchen, Appellant,

vs.

Edmund D. Randolph, Appellee.

SUR MOTION FOR AN ORDER TO ADD PARTIES.

BRIEF IN SUPPORT OF THE MOTION.

Had this motion been made prior to the passage of the act of June 1st, 1872, it would have been, probably, refused, under the well-established rule that the non-joinder of all parties in a writ of error or an appeal, without sufficient cause shown, constitutes a defect which is not the subject of amendment.

The act of 1872, which has altered the law upon this subject, is as follows:—

"The Supreme Court may at any time in its discretion and upon such terms as it may deem just, allow an amendment of a writ of error, when there is a mistake in the *teste* of the writ, or a seal to the writ is wanting, or when the writ is made returnable on a day other than the day of the commencement of the

term next ensuing the issue of the writ, or when the statement of the title of the action or parties thereto in the suit is defective, if the defect can be remedied by reference to the accompanying record, and in all other particulars of form: *Provided*, The defect has not prejudiced and the amendment will not injure the defendant."

Section 1012 of the Revised Statutes (re-enacting the act of September 24th, 1789) provides that "appeals from the Circuit Courts * * * * shall be subject to the same rules, regulations, and restrictions as are or may be prescribed in law in cases of writs of error."

Under these statutes there is no doubt, therefore, that this court possesses a power of amending the record in cases of appeals which it did not have under the law as it formerly stood and as it was explained by the decisions.

The practice to be pursued, however, in granting amendments, such as that here moved for, has not yet been settled.

It is well established that there must be something upon the record of the appellate court to show that the parties who have not united in the appeal have refused to do so, and this in such a manner as to estop them from taking an appeal from the same decree in future. The reason is obvious. The court cannot notice anything outside of the record, and that which does appear upon the record must show that the parties refusing to unite in the appeal have precluded themselves from harassing the court by independent appeals in the future.

The old practice was by summons and severance. In Williams *vs.* The Bank of the United States, 11 Wheaton, 414, the court said that where one of the parties refuses to join in a writ of error, it is worthy of consideration whether the other may not have the remedy by summons and severance, and in the case of Todd *vs* Daniel, 16 Peters, 521, it is said distinctly that such is the proper course. By reference to Tidd's Practice, 1136, it appears that the writ of summons and severance was sued out after the writ of error had been issued. "So," he says, "if a writ of error be brought in the names of several parties, and any one or more of them refuse to appear and assign errors, they

must be summoned and severed, after which the writ of error may be proceeded in by the rest alone."

But the remedy by summons and severance has become obsolete. The whole subject was considered by this court in Masterton *vs.* Herndon, 10 Wal., 416, and it was there said, "This remedy (summons and severance) is one which has fallen into disuse in modern practice and is unfamiliar to the profession. * * * * It has applied to cases of writ of error when one of the plaintiffs refused to join in assigning errors, and in principle is, no doubt, as applicable to cases where there is a refusal to join in obtaining a writ of error or in an appeal. * * * * We do not attach much importance to the technical method of proceeding called summons and severance. We should have held this appeal good if it had appeared in any way by the record that Maverick had been notified in writing to appear or, if appearing, had refused to join. But the mere allegation of his refusal in the petition of appellant does not prove this. We think there should be another notice and due service, or else the record should show his appearance and refusal, and that the court on that ground granted an appeal to the party who prayed for it as to his own interest." In a still later case of Simpson *vs.* Greeley, 20 Wal., 157, this court likewise says that there must be a summons and severance, "or some proceedings of an equivalent character."

What these "proceedings of an equivalent character," which are to take the place of the obsolete summons and severance, are to be, has not been authoritatively settled. It would seem to be most natural (in the absence of any direct practice in this court) to turn to the practice and precedents of the highest English appellate tribunal—the House of Lords. The practice there is to apply for leave to amend the petition of appeal, and to pray for an order to bring in the parties who have been omitted.

This practice will be found stated in MacQueen's Practice in the House of Lords, 123.

This would seem to be the most convenient method of putting upon the record of the court the fact that certain parties declined

to unite in the appeal. A mere notice and service, verified by affidavit, would be no more proof of refusal than a similar recital in the petition for appeal which the court in Masterton *vs.* Herndon, held to be insufficient.

Nor should the fact that the order to show cause why parties should not unite in an appeal is made *after* the appeal is allowed, alter the case. Indeed, such a course seems to be in pursuance of the common-law practice by which the issuing of the writ of error preceded the application for a summons and severance.

GEO. TUCKER BISPHAM,
SAM'L DICKSON,
WAYNE MacVEAGH,
Of Counsel for the Motion.

PAXSON KITCHEN, Appellant,

vs.

EDMUND B. RANDOLPH, et al., Appellees.

AFFIDAVIT OF HENRY BUSHONG.

Henry Bushong, being duly sworn according to law, deposes and says:—That the firm of Bushong & Brother, of which he is a member, is the holder of $240,300 of the Second Mortgage Bonds of the Wilmington and Reading Railroad Company; that they were induced to make this large investment in order to enable the Wilmington and Reading Railroad Company to extend its road from Birdsboro' to the city of Reading—the second mortgage bonds having been issued for the avowed purpose of paying for the equipment of the road and building branches or extensions—and that they and DeHavens took $400,000 of these bonds on the express agreement that the proceeds were to be used to build the branch. That the road originally extended from Wilmington, Del., to Birdsboro', Pa., a distrnce of 63$\frac{1}{2}$ miles, and was afterwards extended from Birdsboro' to a point near Reading, where it connects with the Berks County Railroad, and reaches its depot on Penn Street in the city of Reading.

That the road has not only for its termini two large manufacturing cities, but also reaches between these points, numerous large furnaces and manufactories located at Birdsboro, Coatesville and other places along the line. In addition to this, the iron-ore, lime, stone and general traffic common to a line of railroad running through a good agricultural and mineral region, must, in ordinary times under proper management, give to the Wilmington & Reading Railroad Company a large and lucrative business.

The cost of the road as shown by the report of the company for the year ending October 31, 1874, was $3,200,927.53, and the cost of equipment was $313,699.80. By the proceedings in this case it appears that the total amount of outstanding bonds of first mortgage is $1,212,500, which amount represents only one-third of the total cost and equipment of the road.

That the earnings of the road in the year 1873, when the road only extended to Birdsboro', were $255,496.68, and that the expenses for maintaining the road, &c.—repairs of machinery and operating the road—were $228,846.16. That the tonnage of the road, as shown by the same report, was 301,084 tons, of which nearly one-half was through freight; and the number of passengers carried was 132,000.

That from statements made to him by former officers of the road, as well as the apparent disproportion between the quantity of traffic and the sums realized therefrom; he has reason to believe that the financial success of the road was being crippled and retarded by its management, nearly all of whom were manufacturers or interested in manufactories along the line of the road, and therefore interested in having the lowest possible freight tariff. That with a view to change the management, proceedings were taken by second mortgage bond holders to sell the road, subject to the first mortgage—it being the decided opinion of all railroad experts, that under proper management the interest on the first mortgage could be paid regularly, and the claims of the second mortgage bond holders nearly, if not altogether, secured. That these proceedings resulted in the appointment of commissioners, who were the trustees in all the mortgages; one of them a director of the road, and the others believed to be connected in business with other directors. That the trustees and the company threw every obstacle in the way of a speedy decree of foreclosure in the proceeding by the second mortgage bond holders, and thereby enabled the first mortgage bond holders to institute proceedings and obtain the decree now before this court; that, from the location of the road and its general facilities for large business, the Wilmington & Reading R. R. is, under proper management, a valuable railroad property, and should bring at a fair sale a price greatly in excess of the

first mortgage; that the sale of portions of the road under the present decree, will destroy the property and prevent a fair price being obtained. No persons other than those in the pool of first mortgage bonds can safely bid on the road, so that the result will necessrily be a confiscation of the property for the benefit of a few first mortgage bond holders, who, it is believed are in collusion with some of the Directors and Trustees to buy the property at the lowest possible figure.

That the reports of the commissioners show that from May 8, to December 31, 1875, they expended $29,295.96 for repairs or maintenance of way, and $9,510.86 for repairs of machinery, and since then large sums have been expended, so that it cannot be true that the road is in a bad condition, or that heavy expenditures will be required; that the reports of commissioners show a balance over and above the payment of running expenses and maintenance of way of $13,127.86; that he confidently believes that if the management of the road can be taken out of the hands of manufacturers along its line, whose private interests are best subserved by the lowest possible freights, the road would earn more than enough to pay its interest on first mortgage, and would eventually be able to earn enough to pay interest on both mortgages; that the road is not depreciating in value in the hands of receivers, but on the contrary, owing to certain recent phases of the coal trade, is growing in value, and promises, as a railroad which can be used to connect the coal regions with tide water, to be exceptionally valuable in the future; that an extension of the East Brandywine & Waynesburg Railroad, which connects with this road, is about being completed to New Holland, which extension passes through the richest agricultural region of Lancaster County, and reaches most valuable iron ore banks, some of them now being worked.

That this branch road will greatly increase the traffic of the Wilmington & Reading Railroad, both by the traffic received from this rich country and the coal and freights taken to it.

HENRY BUSHONG.

Sworn and subscribed before me this fourteenth day of October, 1876. JEFFERSON SNYDER, *Notary Public.*

10 Wall 284-291
7 Wall 574
14 Wall 402
12 Flow 389 wide
11 Flow 294
7 Sm 275 wide

11 H
12 Flow

Extend all over
Insert between the two
Bot see 11 H 291
12 H 389
6 Wall 494
6 Wall 188 wide